THE MADRAS LAW JOURNAL REPORTS.

EDITORIAL COMMITTEE.

MR. T. R. VENKATARAMA SASTRI, B.A., B.L., C.I.E.
RAO BAHADUR K. V. KRISHNASWAMY AIYAR, B.A., B.L.
MR. C. A. SESHAGIRI SASTRI, B.A., B.L.
,, S. PANCHAPAGESA SASTRI, B.A., M.L.
,, S. VENKATARAMAN, B.A., M.L. (*Editor-in-Charge*).

REPORTERS.

MR. B. V. VISWANATHA AIYAR, M.A., B.L., *High Court.*
,, S. V. VENUGOPALACHARI, B.A., B.L. ,,
,, K. CHANDRASEKHARA AIYAR, M.A., B.L. ,,
,, K. SANKARANARAYANAN, B.A., B.L. ,,

[1943] I M.L.J.
January—June.

PUBLISHED BY
MR. R. NARAYANASWAMI IYER, B.A., B.L.
Advocate, High Court, Mylapore, Madras.

PRINTED AT THE MADRAS LAW JOURNAL PRESS, MYLAPORE.
[*All Rights Reserved.*]
1943.

JUDGES OF THE HIGH COURT.

JANUARY—JUNE, 1943.

Chief Justice.

The Hon'ble Sir Alfred Henry Lionel Leach, *Kt.* (*Barrister-at-Law*).

Puisne Judges.

The Hon'ble Mr. Justice Vere Mockett, *Kt.*, M.B.E., M.A. (*Barrister-at-Law*).
" " A. J. King, I.C.S.
" " S. Wadsworth, I.C.S. (*Barrister-at-Law*).
" " K. P. Lakshmana Rao, B.A., B.L. (Diwan Bahadur).
" " Abdur Rahman, *Kt.*, LL.D. (Khan Bahadur) (*Barrister-at-Law*) (till 12—2—43).
" " K. S. Krishnaswami Aiyangar, B.A., B.L.
" " B. Somayya, B.A., B.L.
" " M. Patanjali Sastri, B.A., B.L.
" " L. C. Horwill, I.C.S. (*Barrister-at-Law*).
" " A. C. Happell, I.C.S. (*Barrister-at-Law.*)
" " J. A. Bell, M.C. (*Barrister-at-Law*).
" " C. Kunhi Raman, B.A., B.L. (*Barrister-at-Law*) (Diwan Bahadur).
" " J. A. Byers, I.C.S. (*Barrister-at-Law*).
" " N. Chandrasekhara Ayyar, B.A., B.L. (Rao Bahadur).
" " C. N. Kuppuswami Ayyar, B.A., M.L. (Rao Bahadur) (Additional).
" " M. Shahabuddin, I.C.S. (Additional) (from 15—2—43)

Advocate-General.

Sir Alladi Krishnaswami Aiyar, B.A., B.L. (Diwan Bahadur).

TABLE OF CASES REPORTED.

PRIVY COUNCIL.

		PAGE.
Ahmedabad Municipality *v.* Secretary of State	..	423
Bhuru Mal *v.* Jagannath	..	70
Chockalingam Chettiar *v.* Official Assignee of Madras	..	239
Lala Hakim Rai *v.* Lala Ganga Ram	..	16
Lala Hem Chand *v.* Lala Pearey Lal	..	11
Mussammat Sahodra *v.* Ram Babu	..	180
Nawab Habibulla *v.* Commissioner of Income-tax, Bengal	..	494
Raghbir Lala *v.* Mohammad Said	..	208
Raja Mohan Manucha *v.* Manzoor Ahmad Khan	..	508
Ram Lal Dutt Sarkar *v.* Dhirendra Nath Roy	..	514

FEDERAL COURT.

Governor-General in Council *v.* Province of Madras	..	345

HIGH COURT (FULL BENCH).

Damodarasami Naicken *v.* Govindarajulu Naidu	..	291
Kanakamma *v.* Krishnamma	..	335
Nagamma *v.* Lingareddi	..	364
Pappammal *v.* Meenammal	..	1
Sankara Menon *v.* Sundara Aiyar	..	9
Subbarama Reddi *v.* Subba Reddi	..	272
Tirumalai Tirupathi Devasthanams Committee *v.* Krishnayya Shambhaga	..	388

SPECIAL BENCH.

In the matter of an Advocate	..	487
A Pleader, *In re*	..	121
In the natter of a Pleader, Madura	..	396
In the matter of a Pleader, Ottapalam	..	8

OTHER CASES.

Abdul Khader Sahib *v.* Chinniah Naidu	..	49
Abdul Latif, *In re*	..	486
Abdul Salam Sahib, *In re*	..	99
Abdul Shukur Sahib, *In re*	..	409
Akkamma *v.* Kunhammad Haji	..	164
Ananthanarayana Iyer *v.* Sivaramakrishna Iyer	..	100
Angammal *v.* Punnammal	..	155
Annamalai Chettiar *v.* Valliammai Achi	..	95
Aswatha Narayana Gupta *v.* Muneppa	..	160
Atchutarama Rao *v.* Solasa Bapanayya	..	504
Bagavandas Moopanar *v.* Muhammad Gani Rowther	..	319
Bajee Sahib, *In re*	..	446
Balakrishna Odayar, *In re*	..	214

	PAGE.
Balakrishnayya *v.* Linga Rao ..	198
Bapanna Garu *v.* Jagga Rao Garu ..	271
Bethanasami Naidu *v.* Sanjeevi Naidu ..	268
Bezwada Municipal Council *v.* Venkata Nagabhushanam ..	415
Bhavadasan Nambudiripad *v.* Narayana Nair ..	328
Botwala De Rander *v.* J. P. Mitter ..	360
Chennabasappa *v.* Official Receiver of Bellary ..	127
Chidambaram Chettiar *v.* Jagu H. Shah ..	252
Chidambaram Chettiar *v.* Official Receiver, Madras ..	123
China Sattiraju *v.* Virayya ..	149
Chinnaturai Muthiriyan *v.* Official Receiver, Trichinopoly ..	125
Chokkalingam Chetty, *In re* ..	20
Commissioner of Income-tax, Madras *v.* Madras Provincial Co-operative Bank, Limited ..	46
D'Silva *v.* D'Silva ..	165
Daggupati Nayudamma *v.* Sait Sivaraju Dharamchand Kottuvaru ..	394
Dalmia Cement Co., Ltd. *v.* Lourdusami Pillai ..	303
Dharmasamarajayya *v.* Sankamma ..	166
District Magistrate, Cuddappah, *In re* ..	258
District Magistrate of Cuddappah *v.* Syed Abdul Kareem ..	467
Dugarajulugaru *v.* Unlimited Aryan Bank of Vizagapatam ..	333
Egmore Benefit Society *v.* Aburupammal ..	92
Ellappa, *In re* ..	267
Fatima Bibi *v.* Muhammad Usman Sahib ..	212
Ghulam Asadullah Khan *v.* Mohamed Ali Khan ..	131
Godavarti Raja *v.* Sri Ramachandraswami Varu ..	253
Govindarajam Pillai *v.* Alagappa Chettiar ..	477
Grandhe Sarabhayya, *In re* ..	255
Hanumantha Rao *v.* Rama Naidu ..	190
Hindustan Gilt Jewel Works *v.* Gangayya ..	186
Iskapalle Ramiah *v.* Meda Ramiah ..	32
Janaki Bai Ammal *v.* Chinniah Nadar ..	88
Kailasam Pillai *v.* Sivabagyammal ..	203
Kallalagar Devasthanam *v.* Thirumalai Nambigal ..	496
Kandaswami Goundan *v.* Subbarama Ayyar ..	193
Karathammathintakath Kunhamad, *In re* ..	482
Kasiviswanathan Chettiar *v.* Somasundaram Chettiar ..	195
Kissan Singh, *In re* ..	416
Koorapati Seshavatharam *v.* Thalasila Ramayya ..	34
Kothandapani Mudaliar *v.* Dhanammal ..	56
Krishnamurthi Ayyar, *In re* ..	466
Krishnaswami Pillai *v.* Chockalingam Chettiar ..	169
Krishtappa *v.* Premaleelamani ..	120
Kunhi Pakki, *In re* ..	468
Kuppuswami Goundan, *In re* ..	249
Kuppuswami Goundan *v.* Lakshmanan Chettiar ..	285
Kuppuswami Naidu, *In re* ..	344
Kuttiammu *v.* Kalliani Amma ..	299
Kuruba Chinna Hanumakka, *In re* ..	51
Lakshmana Koro *v.* Malladi Visweswara Patrudu ..	174
Lakshmanaswami *v.* Raghavacharyulu ..	104
Leelavathi Ammal *v.* Neni Kavur Bai ..	139
Madura, etc., Devasthanam *v.* Doraiswami Naidu ..	144
Madurakavi Ayyangar *v.* Chinnaswami Chetti ..	137
Mahabala Holla *v.* Kanara Banking Corporation ..	172
Mahammadu Sahib *v.* Muthu Samban ..	318

PAGE.

Maharaja of Pithapuram *v.* Municipal Council, Cocanada .. 150
Makky Moithu, *In re* .. 154
Manathunainatha Desikar *v.* Gopala Chettiar .. 434
Mangamma *v.* E. P. R. Chettiar Firm .. 36
Manilal *v.* Venkatachalapathi Iyer .. 353
Manniappa Moothan *v.* Gopalan Nayar .. 418
Mohammad Usman Co. *v.* Kunhammu .. 87
Mooka Nadar, *In re* .. 352
Muhammad *v.* Chakkappayyan Kannan .. 447
Muhammad Yusuf Sahib *v.* Province of Madras .. 251
Murtuzali Sahib, *In re* .. 247
Murugappa Mudali *v.* Official Receiver, Chittoor .. 24
Muthukaruppa Ethandar *v.* Appavoo Nadar .. 453
Muthukaruppan Chettiar *v.* Commissioner of Income-tax, Madras .. 171
Muthuramalinga Thevar *v.* Rajah of Ramnad .. 45
Nagiah *v.* Satyanarayana Prasad .. 262
Nagoor Durga *v.* Kasinatha Iyer .. 431
Nagulatiah, *In re* .. 130
Nallathambi Pillai *v.* Raghumath Bivi .. 375
Nalluswami Reddi *v.* Nallammal .. 277
Narasayya *v.* Thimmappa .. 289
Narayana Reddiar *v.* Venkatesa Reddiar .. 135
Narayanaswami Ayyar *v.* Narayana Iyengar .. 114
Natesa Nilangiriyar *v.* Raju Mudaliar .. 225
Naupadu Narasimhamurti Patnaick, *In re* .. 382
Neelakandhan Nambudripad *v.* Krishna Aiyar .. 325
Official Assignee *v.* Manickavelu Mudaliar .. 265
Official Receiver of Ramnad *v.* Veerappa Chettiar .. 449
Official Trustee of Madras *v.* Corporation of Madras .. 408
Osuri Narayanaswami *v.* Savanam Venkataswami .. 82
Pachayappa Udayan *v.* Ponna Goundan .. 259
Padmanabham *v.* Kamaraju .. 314
Parankusa Naidu *v.* Ayyanna Naidu .. 445
Pedda Kambi Reddy, *In re* .. 248
Peddiboyima Viswanatham *v.* Srinivasa Venkata Varadacharyulu Ayyavarlam Garu .. 168
Pichayya *v.* Venkatakrishnayya .. 404
Piramanayaga Pandaram, *In re* .. 126
Province of Madras *v.* Maharaja of Jeypore .. 53
Public Prosecutor *v.* Coimbatore National Bank, Ltd. .. 119
Public Prosecutor *v.* Ponnuswami Mudaliar .. 492
Public Prosecutor *v.* Venkatarama Naidu .. 342
Pullayya *v.* Venkatasubbamma .. 83
Radhakrishnan Chettiar *v.* Official Liquidator .. 142
Rajagopala Chettiar *v.* Anjaneya Sastri .. 358
Rajagopala Chettiar *v.* Sundaram Begum .. 237
Raja Lakshmamma *v.* Raghavayya .. 356
Raju Naidu, *In re* .. 153
Ramabrahmam *v.* Traffic Manager, Vizagapatam Port .. 260
Ramachandra Ayyar *v.* Sesha Aiyangar .. 414
Ramachandra Naidu *v.* Muthu Chettiar .. 236
Rama Kamath *v.* Lobo .. 22 (2)
Ramalinga Chetti *v.* Petha Goundan .. 275
Ramanathan Chettiar *v.* Alamelu Achi .. 230
Ramaswami Ayyar *v.* Sapth arishi Reddiar .. 297
Ramaswami Nadar *v.* Virudhunagar Municipal Council .. 406
Ramaswami Naidu *v.* Chinnaswami Naidu .. 233

	PAGE.
Ramaswami Sastrigal *v.* Subramania Ayyar	410
Ramija Bibi *v.* Sharifa Bibi	332
Ranga Konar *v.* Pakkiri Vattachi	493
Ranganathan Chettiar *v.* Mariappa Mudali	102
Rangaswami Aiyangar *v.* Ammayee Ammal	316
Rangaswami Nayudu, *In re*	246
Rangayya Naidu *v.* Sundaramurthy Mudaliar	380
Rathna Bai *v.* Mrs. A. R. Barrass	461
Ratnaswami Goundan *v.* Arunachalam Chettiar	162
Rukmani Achi *v.* Sampurnathammal	286
Sadhu Suryanarayana *v.* Sadhu Lakshmi Sundaramma	179
Sarveswararao *v.* Venkatasubbayya	231
Satyanarayana *v.* Rayalamma	386
Satyanarayanamurthi, *In re*	315
Satyanarayanamurthi *v.* Pydayya	219
Satyanarayanappa *v.* Rahimatullah Sahib	287
Secretary of State *v.* Sivarama Prasad Bahadur	347
Seshagupta, *In re*	22 (1)
Sevugaperumal, *In re*	129
Sitarama Reddy *v.* Bilahal Somappa	402
Sivaraj Lal *v.* Mylapore Hindu Permanent Fund, Ltd.	472
Sivaramayya *v.* Official Receiver of West Godavari	411
Siva Rao *v.* Ramajoga Rao	427
Srinivasa Ayyangar, *In re*	176
Srinivasa Chettiar *v.* Ramaru Goundar	47
Srinivasa Mudaliar *v.* Ramudu Naidu	57
Srinivasalu Chetti *v.* Munisami Chetti	157
Subbaraju *v.* Venkataraju	110
Subba Reddi, *In re*	383
Subba Row *v.* Varadaiah	279
Subrahmanya Sastri *v.* Appana Krishnabrahmam	61
Sudarsana Rao *v.* Dalayya	339
Sundararamier *v.* Chinnapalani Ambalam	351
Swarnam Aiyar *v.* Veeragu Ammal	41
Syed Abdul Wajid Sahib *v.* Oosman Abdul Rubb	78
Syeda Mahomed Rowther *v.* Shanmugasundaram Chettiar	188
Taranata Bhatta *v.* Gopalakrishna Mallayya	422
Thangapandian Nadar, *In re*	59
Thirumalareddi Inna Reddi *v.* Gade Gopireddi	43
Travancore National Bank Subsidiary Co., Ltd. *v.* Tranabank Union	425
Vaithilinga Naidu *v.* Narayanaswami Naidu	323
Varadaraja Padayachi, *In re*	481
Varalakshmamma *v.* Janayya	62
Vasudevan Nambudiri *v.* Valia Thirumalpad	419
Vasudevan Nambudiripad *v.* Ambujakshi	393
Veerabhadra Naicker *v.* Gangamma	178
Vembu Ayyar *v.* Subbiah Pillai	85
Vengannan Chettiar and Sons *v.* Rangaswami Pillai	362
Venkanna *v.* Panchayat Board, Munagapaka	390
Venkatakutumba Rao *v.* Veerabhadrudu	211
Venkatalingam *v.* Mrutyanjayadu	400
Venkata Narasinga Rao *v.* Surayya Raju	457
Venkatapathi *v.* Veerayya	429
Venkataramiah Chetti *v.* Venkataswami Chetti	80
Venkata Siddayya *v.* Sanjappa	321
Venkatasubbamma *v.* Subbiah	469
Venkata Subbarattamma *v.* Krishniah	235

	PAGE.
Venkata Subbayya, *In re* ..	192
Venkatasubbayya *v.* Venkataramayya ..	257
Venkataswami Naicker *v.* Navaneethakrishna Chettiar ..	207
Sri Venkateswaraswami Varu *v.* Sub-Collector, Bezwada ..	66
Venkateswarlu *v.* Audiseshayya ..	421
Venkita Rama Iyer *v.* Kunhi Kandan ..	151
Vijayaratnam Naidu *v.* Sitapatirao Pantulu ..	90
Visalakshi Ammal *v.* Nagappa Chettiar ..	485
Vridhichand Sowcar, *In re* ..	377
Yakub Sahib Yejaman, *In re* ..	264
Yarlagadda Abbayi *v.* Official Receiver ..	39
Yedukondalu *v.* Suryanarayana Rao ..	403
Zamindar of Ettayapuram, *In re* ..	278

TABLE OF CASES CITED.

A

PAGE.

Abdulla Khan v. Basharat Husain, (1912) 25 M.L.J. 91=L.R. 40 I.A. 31=I.L.R. 35 All. 48 (P.C.) ... 475
Abdul Aziz Sahib v. Chokkan Chettiar, (1935) 69 M.L.J. 821=I.L.R. 58 Mad. 893 ... 10
Abdul Hakim Baig v. Mohammad Burramiddin, (1925) I.L.R. 49 Mad. 580 ... 506
Abdul Majid v. Jawahirlal, (1914) 27 M.L.J. 17=I.L.R. 36 All. 350 (P.C.) ... 236
Abdul Majid v. Jew Narain Mahto, (1888) I.L.R. 16 Cal. 233 ... 327
Abdul Sattar Sahib v. Special Deputy Collector, Vizagapatam Harbour Acquisition, (1923) 46 M.L.J. 209=I.L.R. 47 Mad. 357 ... 68
Abdur Rahiman v. Imbichunni, (1932) 63 M.L.J. 357=I.L.R. 55 Mad. 871 ... 395
Abdur Rahim v. Mohamed Barkat Ali, (1927) 54 M.L.J. 609=L.R. 55 I.A. 96=I.L.R. 55 Cal. 519 (P.C.) ...391, 392
Abhoya Charan Sen v. Hem Chandra Pal, (1929) I.L.R. 57 Cal. 137 ... 518
Abi Bunisa Ammal v. Mohamad Kasim Rowther, A. A. A. O. No. 107 of 1929 ... 163
Achammal v. Achammal, (1910) 20 M.L.J. 791 ... 250
Achyut Vishnu v. Tapibai, (1923) I.L.R. 48 Bom. 210 ... 395
Adit Narayan Singh v. Mahabir Prasad Tiwari, (1920) 40 M.L.J. 270=L.R. 48 I.A. 86 (P.C.). 367
Agnes Ammal v. Paul, (1935) 70 M.L.J. 321=I.L.R. 59 Mad. 509 (F.B.) ... 361
Ahmed Bux v. Fazal Karim, (1940) 1 M.L.J. 676=I.L.R. (1940) Mad. 195. 354, 355, 356
Ahmed Musaji Saleji v. Hashim Ibrahim Saleji, (1915) 29 M.L.J. 70=L.R. 42 I.A. 91=I.L.R. 42 Cal. 914 (P.C.) ... 20
Akella Ramasomayajulu v. Official Receiver, Godavari, (1926) 23 L.W. 80 ... 31
Akshayakumarnath Talukdar v. Ahmedali Howladar, (1931) I.L.R. 59 Cal. 180 ... 481
Alagar Iyengar v. Srinivasa Iyengar, (1925) 50 M.L.J. 406 ... 250
Amarendranath v. Balai Chand, A.I.R. 1936 Cal. 267 ... 176
Amirtham Pillai v. Nanja Goundan, (1914) 26 M.L.J. 257 ... 381
Amrat v. Mst. Thagan, I.L.R. (1939) Nag. 115 (F.B.) ... 3, 182
Anand Parkash v. Narain Das Dorilal, (1930) I.L.R. 53 All. 239 (F.B.) ... 27
Angamuthu v. Sinnapennammal, A.I.R. 1938 Mad. 364 ... 182
Angamuthu Muthirian v. Sinnapennammal, (1937) 47 L.W. 286 ... 2, 6, 8
Annada Mohan Roy v. Gour Mohan Mullik, (1923) 45 M.L.J. 617=L.R. 50 I.A. 239=I.L.R. 50 Cal. 929 (P.C.) ... 513
Annamalai v. Muthuswami, (1939) 1 M.L.J. 792=I.L.R. (1939) Mad. 891 ... 341
Annamalai v. Ramaswami, (1941) 1 M.L.J. 45=I.L.R. (1941) Mad. 438 (F.B.) ... 272
Annamalai Chetty v. Subramanian Chetty, (1928) 56 M.L.J. 435=27 A.L.J. 9 (P.C.) ... 74
Ansarali v. Bhim Sankar Datta Tewari, (1929) I.L.R. 56 Cal. 969 ... 290
Anwar Khan v. Muhammad Khan, (1929) I.L.R. 51 All. 550 ... 31
Anwarsada Khan Pani Sahib v. Misiri Khan Pani Sahib, (1916) 31 M.L.J. 44 ... 272
Appanna Poricha v. Narasinga Poricha, (1921) 41 M.L.J. 608=I.L.R. 45 Mad. 113 (F.B.) ... 391, 392
Ariff v. Jadunath Majumdar, (1931) 60 M.L.J. 538=L.R. 58 I.A. 91=I.L.R. 58 Cal. 1235 (P.C.) ... 336
Arunachalam v. Seetharam, (1941) 1 M.L.J. 561=I.L.R. (1941) Mad. 930 ... 433
Aryalpurath v. Cheekiladen Ahmed, (1909) 2 I.C. 204 ... 396
Ascherson v. Tredgar Dry Dock and Wharf Co., Ltd., (1909) 2 Ch. 401 ... 134
Askaran Sowkar v. Venkataswami Naidu, (1920) 40 M.L.J. 218=I.L.R. 44 Mad. 872 (F.B.)... 136, 137
Atul Krishna Ray v. Lal Nandanji, (1935) I.L.R. 14 Pat. 732 (F.B.) ... 270
Austerbery v. Corporation of Oldham, (1885) L.R. 29 Ch.D. 750 ... 293
Ayyappa v. Kasiperumal, (1939) 1 M.L.J. 163=I.L.R. (1939) Mad. 374 (F.B.) ... 450
Ayyanna v. Secretary of State, (1933) 65 M.L.J. 179=I.L.R. 56 Mad. 696 ... 350
Ayyaswami Ayyar v. Sivakki Ammal, (1932) 65 M.L.J. 407=I.L.R. 56 Mad. 909 ... 118
Ayyavaru Setti v. Kichamma, C. M. A. No. 321 of 1940 ... 254

B

Baboo Asharfilal v. The Judges of the Allahabad High Court, (1929) 58 M.L.J. 483 (P.C.) ... 122, 123
Baboo Gunnesh Dutt Singh v. Magneeram Choudhury, (1872) 11 Beng.L.R. 321 (P.C.) ... 187
Babu *alias* Govindoss Krishnadoss v. Gokuldoss Goverdandoss, (1928) 55 M.L.J. 132 ... 258
Babu Chand v. Mugnit Rao, (1896) I.L.R. 22 Bom. 340 ... 11
Babu Singh v. Behari Lal, (1908) I.L.R. 30 All. 156 ... 108
Badilam Narayanamma v. Neti Venkatasomayajulu, (1934) 67 M.L.J. 616 ... 31
Bai Mativahoo v. Bai Mamoobai, (1897) L.R. 24 I.A. 93 ... 440

PAGES

Bajit Lal Pathak v. Maharajadhiraj Sir Rameshwar Singh Bahadur, (1928) I.L.R. 7 Pat 333. 290
Balaguruswami Naicken v. Guruswami Naicken, (1924) 48 M.L.J. 506 ... 10
Balakrishna Chettiar v. Krishnamurthi Ayyar, (1926) 52 M.L.J. 182 at 184 ... 506
Balammal v. Palandi Naidu, (1938) 2 M.L.J. 340 ... 188
Balaraju Chettiar v. Masilamony Pillai, (1929) 58 M.L.J. 675=I.L.R. 53 Mad. 334 ... 395
T. S. Balavenkata Sitarama Chettiar v. Official Receiver, Tanjore, (1926) 51 M.L.J. 269= I.L.R. 49 Mad. 849 (F.B.) ... 29
S. N. Banerjee v. Kuchwar Lime and Stone Co., Ltd., (1938) I.L.R. 17 Pat. 770 (P.C.) ... 401
Basaveswaraswami v. The Bellary Municipal Council, (1912) 23 M.L.J. 479=I.L.R. 38 Mad. 6 ... 407
Battina Appanna v. Raja Yarlagadda, (1917) 33 M.L.J. 355 ... 111
Bava C. Vaithilinga Mudaliar v. The Board of Control, Sri Thyagarajaswami Devasthanam, Tiruvarur, (1936) 71 M.L.J. 87=I.L.R. 59 Mad. 751 ... 505, 506
Beeju Bee v. Syed Moorthuza Sahib, (1919) 37 M.L.J. 627=I.L.R. 43 Mad. 214 ... 332, 333
Bengal Insurance and Real Property Co., Ltd. v. Velayammal, I.L.R. (1937) Mad. 990 ... 354, 355
Bhagchand Dagadusa v. Secretary of State for India, (1927) 53 M.L.J. 81=I.L.R. 51 Bom. 725 at 747 (F.B.) ... 55
Bhagwan Dei Musammat v. Radha Mussammat, (1933) I.L.R. 8 Luck. 646 ... 183
Bhagwan Singh v. Beharilal, I.L.R. (1938) Nag. 221 ... 376
Bijai Saran Sahi v. Rudra Bageswari Prasad Bahadur Sahi, (1929) 58 M.L.J. 440 (P.C.)... 102
Biseswara Chaudhuri v. Kanhai Singh, (1931) I.L.R. 11 Pat. 9 ... 31
Bisweswar Singh v. Bholanath Pathuk, (1913) 22 I.C. 751 ... 161
Boddu Paidanna and Sons v. The Province of Madras, (1942) 2 M.L.J. 797=(1943) 5 F.L.J. 95 ... 346
Brogden, *In re* : Billing v. Brogden, (1888) 38 Ch.D. 546 at 557 ... 146
Budhan v. Emperor, (1925) 88 I.C. 362 ... 246
Burton v. The Great Northern Railway Co., (1854) 96 Rev. Rep. 811 ... 307
Budree Das Mukin v. Chooni Lal Johury, (1906) I.L.R. 33 Cal. 789 ... 390

C

Cairncross v. Lorimer, 3 H. L. C. 829 ... 221
Chairman, Municipal Council, Srirangam v. Subba Pandithar, (1913) 25 M.L.J. 297= I.L.R. 38 Mad. 456 ... 407
Chanbasappa v. Basalingayya, (1927) I.L.R. 51 Bom. 908 (F.B.) ... 174
Chandrikah Singh v. Rashbehary Singh, (1907) I.L.R. 36 Cal. 193 ... 202
Chandu Nair v. Madhavi, A. A. O. No. 206 of 1928 ... 250
Chaudhuri Talib Ali v. Mst. Kaniz Fatima Begam, (1927) I.L.R. 2 Luck. 575 ... 83
Chella Narasiah v. Sanatan Obbayya, (1913) 25 M.L.J. 601 ... 58, 59
Chennappa v. Onkarappa, (1939) 2 M.L.J. 884=I.L.R. (1940) Mad. 358 (F.B.) ... 86, 87
Chidambaram v. Murugesam, (1939) 2 M.L.J. 671=I.L.R. (1940) Mad. 60 ... 237
Chidambaram v. Parvathi, A.I.R. 1926 Mad. 347 ... 42
Chidambaram Chettiar v. Sellakumara Goundan, (1941) 2 M.L.J. 684 (F.B.) ... 140
Chimanlal v. Hari Chand, (1913) L.R. 40 I.A. 156=I.L.R. 40 Cal. 879 at 890 (P.C.) ... 197
China Kondayya v. Ramalinga Reddi, (1941) 2 M.L.J. 1060 ... 35
Chingacham Vitil Sankaran Nair v. Chingacham Vitil Gopala Menon, (1906) I.L.R. 30 Mad. 18 ... 250
Chinna Pichu Aiyangar v. Padmanabha Aiyangar, (1920) 39 M.L.J. 417=I.L.R. 44 Mad. 121 ... 365, 371
Chinnu Pillai v. Kalimuthu Chetti, (1911) 21 M.L.J. 246=I.L.R. 35 Mad. 47 (F.B.) ... 224
Chockalinga Thevar v. Sankarappa Naicker, (1942) 1 M.L.J. 281 ... 5
Chockalingam Chetty, *In re*, (1943) 1 M.L.J. 20 ... 468
Chockalingam Chetti v. Seethai Acha, (1927) 54 M.L.J. 88=L.R. 55 I.A. 7=I.L.R. 6 Rang. 29 (P.C.) ... 430
Churchward v. The Queen, (1865) 1 Q.B. 173 at 195 ... 307, 309
Cohen v. Mitchell, (1890) 25 Q.B.D. 262 ... 266
Colab Sao v. Chowdhury Madholal, (1905) 2 C.L.J. 384=9 C.W.N. 956 ... 202
Collector of Bombay v. Kamalavahooji, A.I.R. 1934 Bom. 162 ... 54
Colonial Sugar Refining Co., Ltd. v. Irving, (1905) A.C. 369 ... 337, 338
Commissioner of Income-tax, Bihar and Orissa v. Maharajadhiraja of Dharbanga, (1935) 69 M.L.J. 474=L.R. 62 I.A. 215=I.L.R. 14 Pat. 623 (P.C.) ... 475, 495
Corporation of Madras v. Madras Electric Tramways, Ltd., (1930) 60 M.L.J. 551=I.L.R. 54 Mad. 364 ... 238
Crowe v. Price, (1889) 22 Q.B.D. 429 ... 266

D

Dalsingar Singh v. Mt. Jainath Kuar, A.I.R. 1940 Oudh 138 ... 183
Dasrulala v. Narayan, I.L.R. (1937) Nag. 401 ... 422
Dawkins v. Lord Rockby, (1875) L.R. 7 H.L. 744 ... 187
Daw Mya v. Emperor, A.I.R. 1937 Rang. 248 ... 161
Delhi Cloth and General Mills Co., Ltd. v. The Income-tax Commissioner, Delhi, (1927) 53 M.L.J. 819=L.R. 54 I.A. 421 (P.C.) ... 337, 339

PAGE.

Deo Nandan Prasad v. Janki Singh, (1916) 32 M.L.J. 206=L.R. 44 I.A. 50=I.L.R. 44 Cal. 573 (P.C.) ... 480
Desikachari v. Official Receiver, Chingleput, (1942) 2 M.L.J. 714 ... 357
Des Reaux and Setchfield's Contract, *In re*, (1926) 1 Ch. 178 ... 465
Devey v. Cory, (1901) A.C. 477 ... 147
Dhanraj Rai v. Ram Naresh Rai, (1924) 79 I.C. 1049 ... 159
Dhapo v. Ramachandra, (1934) I.L.R. 57 All. 374 ... 30
Dharapuram Janopakara Nidhi, Ltd. v. Lakshminarayana, (1939) 1 M.L.J. 802=I.L.R. (1939) Mad. 803 (F.B.) ... 213
Dharmarao v. Bapanayya, (1941) 1 M.L.J. 15 ... 360
Dhunput Singh v. Mahomed Kasim Ispahain, (1896) I.L.R. 24 Cal. 296 ... 518
Dillwyn v. Llewelyn, (1862) 4 D. F. and J. 517=45 E.R. 1285 ... 206
Dwijendra Nath v. Aftabuddi Sardar, (1916) 21 C.W.N. 492 ... 518
Donepudi Subramanyam v. Narasimham, (1928) 56 M.L.J. 489 ... 251
Doorga Singh v. Sheo Pershad Singh, (1889) I.L.R. 16 Cal. 194 ... 481
Doraiswami Thevan v. Lakshmanan Chettiar, (1932) 38 L.W. 240 ... 188
Doraiappa Aiyar v. The Official Assignee, Madras, (1921) 42 M.L.J. 141 ... 31
Duke of Beaufort v. Patrick, (1853) 17 Beav. 60=51 E.R. 954 ... 206
Duraiswami Gurukkal v. Subramania Gurukkal, (1927) 54 M.L.J. 361=I.L.R. 51 Mad. 266 (F.B.) ... 112
Duthy and Jesson's Contract, *In re*, (1898) 1 Ch. 419 ... 465

E

Egala Nagappa Naidu v. Munuswami Iyer, (1922) 42 M.L.J. 432=I.L.R. 46 Mad. 30 ... 405
Emperor v. Bisheshar Bhattacharya, (1910) I.L.R. 32 All. 635 ... 484
Emperor v. Narayanaswami Naidu, (1936) M.W.N. 1351 ... 126
Emperor v. Ramanuja Iyengar, (1934) 68 M.L.J. (Supp.) 73=I.L.R. 58 Mad. 642 (F.B.)... 193
Evans v. Nicholson, (1875) 32 L.T. (N.S.) 778 ... 354, 356
Ex parte Griffin : *In re* Adams, (1879) 12 Ch.D. 480 ... 264
Ex parte The Governors of St. Thomas Hospital, (1911) 2 K.B. 705 ... 134
Ezra v. The Secretary of State, (1905) I.L.R. 32 Cal. 605 ... 68, 69

F

Falkner v. The Equitable Reversionary Interest Society, (1858) 28 L.J. Ch. 137 ... 479
Farrar v. Farras, Ltd., (1888) 40 Ch.D. 395 ... 94
Fazal Hussain v. Muhammad Kazim, (1933) I.L.R. 56 All. 582 ... 222, 223
Feroz Shah v. Sohbat Khan, (1933) 65 M.L.J. 150=L.R. 60 I.A. 273=I.L.R. 14 Lah. 466 (P.C.) ... 475
Firm Govindram Dwarkadas v. Nathulal, A.I.R. 1937 Nag. 45 ... 270
Ford v. Newth, (1901) 1 Q.B. 683 ... 307, 309
Frankel v. Sutherfield, (1890) 19 Atl. Rep. 898 ... 202
Fuzloor Rahman v. Altaf Hussain, (1884) I.L.R. 10 Cal. 541 ... 11

G

Gajadhar Prasad v. Gouri Shanker, (1932) I.L.R. 54 All. 698 at 699 (F.B.). 370, 371, 372, 374
Gajadhar Singh v. Kishan Jivanlal, (1917) I.L.R. 39 All. 641 (F.B.) ... 200
Gallagher v. Hirish, (1899) N.Y. 45 App. Div. 467 ... 313
Ganapathi Chetti v. Sundararaja Pillai, A.I.R. 1930 Mad. 239 ... 56
Gane v. Norton Hill Colliery Co., (1909) 2 K.B. 539 ... 179
Ganeshchunder Dhur v. Lal Behary Dhur, (1936) 71 M.L.J. 740=L.R. 63 I.A. 448 (P.C.)... 441
Ganga Sahai v. Kesari, (1915) 29 M.L.J. 329=L.R. 42 I.A. 177=I.L.R. 37 All. 545 (P.C.). 7, 184
Gardner v. Lucas, (1878) 3 A.C. 582 at 599 ... 338
Garib Ullah v. Khalak Singh, (1903) L.R. 30 I.A. 165=I.L.R. 25 All. 407 at 416 (P.C.) ... 30
Garuddas v. Laldas, (1933) 64 M.L.J. 660=L.R. 60 I.A. 189 (P.C.) ... 184
General Manager of the Raj Durbhunga v. Maharajah Coomar Ramput Singh, (1872) 14 M.I.A. 605 ... 146
Ghulam Muhyuddin v. Secretary of State, (1914) 24 I.C. 379 ... 67
Girdharee Lal v. Kantoo Lal, (1874) L.R. 1 I.A. 321 ... 108
Gnanasambanda Pandara Sannadhi v. Velu Pandaram, (1899) 10 M.L.J. 29=L.R. 27 I.A. 69=I.L.R. 23 Mad. 271 (P.C.). 438, 439, 441, 442
Gobind v. Ram Lal, (1937) I.L.R. 18 Lah. 395 ... 160
Govindas Rajaramdas v. Ganpatdoss Narottamdas, (1923) I.L.R. 47 Bom. 783 ... 97
Golab Chand v. Janki Koer, (1913) I.L.R. 41 Cal. 286 ... 396
Gopalachariar v. Deepchand Sowcar, (1940) 2 M.L.J. 782=I.L.R. (1941) Mad. 393 ... 265
Gopalakrishnayya v. Narasimha Rao, (1940) 2 M.L.J. 585 ... 81
Gopal Chunder Bose v. Kartick Chunder Dey, (1902) I.L.R. 29 Cal. 716 ... 439, 441
Gopal Chunder Chatterjee v. Gunamoni Dasi, (1892) I.L.R. 20 Cal. 370 ... 85
Gopanund Jha v. Lalla Gobind Pershad, (1869) 12 W.R. 109 ... 518, 519
Gopinath Singh v. Hardeo Singh, (1909) I.L.R. 31 All. 285 ... 192

PAGE.

Gour *v.* Nilmadhab, (1913) I.L.R. 41 Cal. 286 ... 396
Gour *v.* Rakhal, (1916) 27 C.L.J. 326 ... 396
Govindan Nair *v.* Madhavi, (1932) 62 M.L.J. 712 ... 250
Govindaswami Chetty, *In re*, (1939) 1 M.L.J. 608 ... 452
Great Northern Railway Company *v.* Witham, (1873) 9 Com. Pleas 16 ... 307
Greedharee Doss *v.* Nundokissore Doss Mohunt, (1867) 11 M.I.A. 405 at 428 ... 438
Green *v.* Marsh, (1892) 2 Q.B. 330 ... 476
Green *v.* Rutherford, (1750) 1 Ves. Sen. 463=27 E.R. 1144 ... 439
Gregory *v.* Mighell, (1811) 18 Ves. 328=34 E.R. 341 ... 206
C. E. Grey *v.* Lamond Walker & Co., (1913) 17 C.W.N. 578 ... 218
Gridharilal Roy *v.* The Government of Bengal, (1868) 12 M.I.A. 448 ... 370
Gunga Govindas Mundal *v.* The Collector of the Twenty Four Pergunnas, (1866) 11 M.I.A. 345 at 361 (P.C.) ... 15
Guranditta *v.* Mt. Jiwani, A.I.R. 1937 Lah. 11 ... 184
Guruddas *v.* Laldas, (1933) 64 M.L.J. 660=L.R. 60 I.A. 189 (P.C.) ... 7
Guruvammal *v.* Arumugha Padayachi, (1931) 61 M.L.J. 894 ... 404

H

Halliday *v.* Holgate, (1868) L.R. 3 Ex.Cas. 299 ... 143
Hanmant *v.* Jainapur, (1938) 40 Bom.L.R. 932 ... 453
Hansraj Gupta *v.* Official Liquidators, Dehra Dun, Mussori Electric Tramway Co., (1933) 64 M.L.J. 403=L.R. 60 I.A. 13=I.L.R. 54 All. 1067 (P.C.) ... 513
Hari Rao *v.* Official Assignee, Madras, (1926) 50 M.L.J. 358=I.L.R. 49 Mad. 461 (F.B.). 128
Hari Sabaji *v.* Shrinivas Vithal, (1931) I.L.R. 55 Bom. 693 ... 230
Harkness *v.* Hyde, (1878) 98 U.S. 476 ... 202
Harnam Singh *v.* Aziz, (1937) I.L.R. 18 Lah. 769 ... 160
Harnath Kuer *v.* Indar Bahadur Singh, (1922) 44 M.L.J. 489=L.R. 50 I.A. 69=I.L.R. 45 All. 179 (P.C.) ... 513
Harro Kumari Chowdhrani *v.* Turna Chandra Sarbogya, (1900) I.L.R. 28 Cal. 188 ... 518
Hem Chunder Chowdhury *v.* Brojo Soondhury Debee, (1881) I.L.R. 8 Cal. 89 ... 11
Hobart *v.* Frost, (1856) 5 Duer N.Y. 672 ... 202
Holgate *v.* Kay, (1844) 1 Car. & Kir. 341=174 E.R. 838 ... 518
Hussain Ali *v.* Dinbai, (1923) 25 Bom.L.R. 252 ... 57

I

In the case of Chinnaswami Iyer, (1909) 19 M.L.J. 566 ... 382, 383
In re an Advocate, (1931) 61 M.L.J. 148=I.L.R. 54 Mad. 857 (F.B.) ... 122
In re a Pleader, (1942) 2 M.L.J. 196=I.L.R. (1943) Mad. 30 (S.B.) ... 491
In re A. V. Subba Rao, (1929) 57 M.L.J. 780 ... 490, 491
In re Branson : *Ex parte* The Trustee, (1914) 2 K.B. 701 ... 217, 218
In re Brier : Brier *v.* Evison, (1884) 26 Ch.D. 238 ... 147
In re City Equitable Fire Insurance Co., (1925) 1 Ch. 407 at 429 ... 147
In re Davies : *Ex parte* King, (1876) 3 Ch.D. 461 ... 264
In re National Bank of Wales, Ltd., (1899) 2 Ch. 629 at 673 ... 146
In re Parry : *Ex parte* Salaman, (1904) 1 K.B. 129 ... 167
In re The Land Acquisition Act, (1905) I.L.R. 30 Bom. 275 ... 67, 68
In re Wheater, (1928) 1 Ch. 223 ... 23
In the matter of First Grade Pleader, (1924) 92 I.C. 214 (F.B.) ... 397, 398
In the matter of Second Grade Pleader, (1923) 45 M.L.J. 684 (F.B.) ... 397, 399
Isacs *v.* Keech, (1925) 2 K.B. 354 ... 448
Iswari Bhubaneswari Thakurani *v.* Brojo Nath Dey, (1937) 2 M.L.J. 527=L.R. 64 I.A. 203=I.L.R. (1937) 2 Cal. 447 (P.C.) ... 359
Izzat Un-nissa Begam *v.* Partab Singh, (1909) 19 M.L.J. 682=L.R. 26 I.A. 203=I.L.R. 31 All. 583 at 589 (P.C.) ... 281

J

Jagadamba Prasad Lalla *v.* Anadinath Roy, (1938) I.L.R. 17 Pat. 460 ... 338
Jagannath *v.* Emperor, A.I.R. 1932 Lah. 7 ... 343
Jaggadamba Dassee *v.* Puddomoney Dassee, (1875) 15 Beng.L.R. 318 at 330 ... 443
Jaggo Bai *v.* Utsavalal, (1929) 57 M.L.J. 160=L.R. 56 I.A. 267=I.L.R. 51 All. 439 (P.C.) ... 336
Jai Berhma *v.* Kedar Nath Marwari, (1922) 44 M.L.J. 735=L.R. 49 I.A. 351=I.L.R. 2 Pat. 10 (P.C.) ... 34
Jamal Sahib *v.* Murugayyaswami, (1886) I.L.R. 10 Bom. 34 ... 444
Jalland *v.* Sprague, (1838) 12 Peters 300 ... 202
Janaki Bai *v.* Tiruchitrambala Vinayakar, (1935) 69 M.L.J. 291=I.L.R. 58 Mad. 988 (F.B.). 389, 391, 392
Jesa Ram's case, A.I.R. 1936 Lah. 816 ... 222
Juggewundas Keekshaw *v.* Ramdas Brijbookundas, (1841) 2 M.I.A. 487 ... 474
Justices of the Peace for Calcutta *v.* The Oriental Gas Co., (1872) 8 Beng.L.R. 433 ... 401

PAGE.

K

Kabootra Musammat v. Ram Padarath, (1935) I.L.R. 11 Luck. 148 ... 2
Kailash Chunder Tarapodar v. Gopal Chandra Poddar, (1926) I.L.R. 53 Cal. 781 (F.B.) ... 11
Kaliyammal v. Kolandavelu Gounder, (1916) 5 L.W. 228 ... 282
Kamakshi Achari v. Appavu Pillai, (1863) 1 M.H.C.R. 448 at 450 ... 301
Kamalammal v. Chockalinga Asari, (1923) 45 M.L.J. 840 ... 388
Kamaraju v. Chanduri Gunnayya, (1923) 45 M.L.J. 240 ... 250
S. M. Kamini Devi v. Ramlochan Sircar, (1870) 5 Beng.L.R. 450 ... 479, 480
Kamisetti Subbiah v. Katha Venkataswami, (1903) I.L.R. 27 Mad. 355 ... 354
Kandaswami Pillai v. Chinnabha, (1920) 40 M.L.J. 105=I.L.R. 44 Mad. 253 ... 156, 157
Kanjee and Mooljee Bros. v. Shanmugham Pillai, (1932) 63 M.L.J. 587=I.L.R. 56 Mad. 169. 335, 336
Kannan v. Avvulla Haji, (1926) 52 M.L.J. 1=I.L.R. 50 Mad. 403 ... 10
Kapoor Chand v. Suraj Prasad, (1933) I.L.R. 55 All. 301 (F.B.) ... 320
Karuppanna Goundar v. Chidambaram Chettiar, (1936) 71 M.L.J. 646 ... 163
Kasinatha Aiyar v. Uthumunnesa Rowther, (1901) 12 M.L.J. 1=I.L.R. 25 Mad. 529... 10
Kattamidi Ranga Reddi v. Emperor, (1934) M.W.N. 862 ... 484
Katyayani Debi v. Uday Kumar Das, (1924) L.R. 52 I.A. 160 at 166=I.L.R. 52 Cal. 417 (P.C.) ... 518
Kerala Varma Valia Raja v. Shangaram, (1892) I.L.R. 16 Mad. 452 ... 10
Kesar Singh v. Secretary of State for India, (1926) 51 M.L.J. 16=I.L.R. 49 Mad. 652 ... 365, 372
Khabootra Mussammat v. Ram Padarath, (1935) I.L.R. 11 Luck. 148 ... 182
King v. Henderson, (1898) A.C. 720 ... 264
Kiran Bala Shaha v. Sunnit Prabha Shaha, I.L.R. (1939) 1 Cal. 273 ... 452
Kisendas v. Dhandu, (1919) I.L.R. 44 Bom. 542 ... 57
Koduru Venku Reddi v. Mugunta Venku Reddi, (1926) 52 M.L.J. 387=I.L.R. 50 Mad. 535. 27
Kollipara Seethapathy v. Kantipati Subbayya, (1909) 20 M.L.J. 718=I.L.R. 33 Mad. 323 (F.B.) ... 421
Kona Adinarayana v. Dronavalli Venkatasubbiah, (1937) 2 M.L.J. 653 ... 30
Koormayya v. Krishnama Naidu, (1893) 3 M.L.J. 296=I.L.R. 17 Mad. 165 ... 10
Kootoorlinga Pillai v. Sennappa Reddiar, (1931) 61 M.L.J. 203 ... 388
Krishnaji Vianktuh v. Pandurang, (1873) 12 Bom.H.C.R. 65 ... 184
Krishna Kishore De v. Amarnath Kshetry, (1920) I.L.R. 47 Cal. 770 ... 364
Krishnamachariar v. Chinnammal, (1913) 24 M.L.J. 192 ... 457
Krishnamachariar v. The Official Assignee of Madras, (1931) 62 M.L.J. 185=I.L.R. 55 Mad. 455 ... 491
Krishna Menon v. Calicut Bank, (1940) 2 M.L.J. 53 (S.N.) ... 296, 297
T. G. Krishnamurthi v. Vedantam Seetharamanujacharyulu, (1936) 45 L.W. 230 ... 506
Krishnan Lal v. Garudhwaja Prasad Singh, (1899) I.L.R. 21 All. 238 ... 108
Krishna Pattar v. Seetharama Pattar, (1926) 51 M.L.J. 480=I.L.R. 50 Mad. 49 ... 97
Krishnaswami Konan v. Ramaswami Iyer, (1899) 9 M.L.J. 127=I.L.R. 22 Mad. 519 ... 270
Kruttiventi Perraju v. Sabbella Bapireddi, (1926) 90 I.C. 694 ... 192
Kumaravelu Chettiar v. Ramaswami Ayyar, (1933) 65 M.L.J. 87=L.R. 60 I.A. 278=I.L.R. 56 Mad. 657 at 666 (P.C.) ... 455, 456
Kumud Kumar Bose v. Hari Mohan Samaddar, (1916) 21 C.L.J. 628 ... 290
Kunchithapatham Pillai v. Palamalai Pillai, (1916) 32 M.L.J. 347 ... 293
Kunjamani Dassee v. Nikunja Behari Das, (1915) 20 C.W.N. 314 ... 441
Kunju Nair v. Narayanan Nair, (1932) 65 M.L.J. 29 ... 301, 302
Kuppuswami Chettiar v. Rajagopala Aiyar, (1921) 42 M.L.J. 303=I.L.R. 45 Mad. 466... 97

L

Lacey v. Hill, (1874) L.R. 18 Eq. 182 ... 134
Lachman v. Emperor, (1927) 28 Cr.L.J. 515 ... 246
Laduram Nathumull v. Nandalal Karuri, (1919) I.L.R. 47 Cal. 555 at 457 ... 218
Lakharaghula Sundaramma v. Desika Venkatachalamiah, A.I.R. 1939 Mad. 438 ... 29
Lakshmana Maruti Jadhaw v. Maruti Lakshman Teli, (1924) 26 Bom.L.R. 284 ... 169
Lakshmana Reddiar v. Sri Subramaniaswami, (1938) 1 M.L.J. 634=I.L.R. (1938) Mad. 888 ... 44
Lakshmanan Chettiar v. Kannammal, (1900) I.L.R. 24 Mad. 185 ... 10
Lakshmanan Chettiar v. Palaniappa Chetti, A.I.R. 1928 Mad. 1052 ... 201
Lakshmana Rao v. Shrinivas, A.I.R. 1927 P.C. 217 ... 388
Lakshmi Ammal v. The Official Receiver, Tinnevelly, (1934) 67 M.L.J. 364 ... 5
Lakshmi Amma v. Sankaranarayana Menon, (1935) 70 M.L.J. 1=I.L.R. 59 Mad. 359 (F.B.) 338
Lakshmi Naidu v. Gunnamma, (1934) 68 M.L.J. 470=I.L.R. 58 Mad. 418 ... 137
Lalman v. Bhishambarnath, (1931) I.L.R. 54 All. 359 ... 239
Latafat Ali Khan v. Kalyanmal, I.L.R. (1938) All. 342 ... 11
Laxman v. Dhamori Co-operative Society, A.I.R. 1933 Nag. 211 ... 288
Laxmiram Lallubhai v. Balashanker Veniram, (1914) I.L.R. 39 Bom. 20 ... 97
Leaming v. Lady Murray, (1879) 13 Ch.D. 123 ... 216, 218
Ledgard v. Bull, (1886) L.R. 13 I.A. 134=I.L.R. 9 All. 191 (P.C.) ... 202
Ledwith v. Roberts, (1937) 1 K.B. 232 ... 448

PAGE.

Lee *v.* Sangster, (1857) 2 C.B. (N.S.) 1=140 E.R. 310 ... 216, 218
Lion Mutual Marine Insurance Association *v.* Tucker, (1883) 53 L.J. Q.B. 185 at 189 ... 184
London County Council *v.* Aylesbury Dairy Company, (1898) 1 Q.B. 106 ... 21

M

M. M. R. M. Chettiar Firm *v.* S. R. M. S. L. Chettiar Firm, (1941) 46 C.W.N. 57 (P.C.) ... 339
Madam Pillai *v.* Badrakali Ammal, (1922) 42 M.L.J. 410=I.L.R. 45 Mad. 612 (F.B.) ... 83
Madden *v.* Chappani, (1887) I.L.R. 11 Mad. 336 ... 64
Madhab Chandra Ghosh *v.* Nirode Chandra Ghose, I.L.R. (1939) 1 Cal. 574 ... 187
Madhwa Siddhanta Onnahini Nidhi, Ltd. *v.* Venkataramanjulu Naidu, (1903) I.L.R. 26 Mad. 662 (F.B.). 474, 475, 476
Mahabir *v.* Raghunandhan, (1931) I.L.R. 54 All. 399 ... 414
Mahalingam Chettiar *v.* Antony Nadar, C. M. A. No. 266 of 1930 ... 457
Maharaj Bahadur Sing *v.* A. H. Forbes, (1929) 57 M.L.J. 184 (P.C.) ... 98
Maharajah Singh *v.* Balwant Singh, (1906) I.L.R. 28 All. 508 at 521 ... 108
Mahim Chandra *v.* Karamali, (1928) 33 C.W.N. 501 ... 518
Maina Bibi *v.* Chaudhri Vakil Ahmad, (1924) 48 M.L.J. 667=L.R. 52 I.A. 145=I.L.R. 47 All. 250 (P.C.) ... 332, 333
Malabar Forests and Rubber Co., Ltd. *v.* Manavikraman Thirumalpad,(1933) 66 M.L.J. 418. 50
Mangat Rai *v.* Duli Chand, (1933) I.L.R. 55 All. 735 ... 65
Mangayya *v.* Sriramulu, (1913) 24 M.L.J. 477 ... 272
Manglu Sahu *v.* Ramdhani Tamboli, A.I.R. 1929 Pat. 93 ... 320
Manickam *v.* Manikyamma, (1941) 2 M.L.J. 671 ... 414
Manohar Mukerji *v.* Bhupendranath Mukerji, (1932) I.L.R. 60 Cal. 452 (F.B.). 439, 441, 442
Marina Ammay *v.* Secretary of State, (1941) 1 M..L.J. 547 ... 55
Mathuranath Mukerjee *v.* Lakshminarain Ganguly, (1922) I.L.R. 50 Cal. 426 ... 440
McCullum *v.* Northumbrain Shipping Company, Limited, (1932) 147 L.T. 361 ... 261
Meherban Khan *v.* Makhena, (1930) 58 M.L.J. 714=L.R. 57 I.A. 168=I.L.R. 11 Lah. 251 (P.C.) ... 156
Meyappan Chettiar *v.* Chidambaram Chettiar, (1923) 46 M.L.J. 415=I.L.R. 47 Mad. 483 (F.B.) ... 227, 228
Minakshi Naidu *v.* Subramania Sastri, (1887) L.R. 14 I.A. 160=I.L.R. 11 Mad. 26 (P.C.) ... 202
Mohamad *v.* Ganapati, (1890) I.L.R. 13 Mad. 277 ... 443
Mohamad Ishaq *v.* Rup Narain, A.I.R. 1931 All. 562 ... 420
Mohamed Anser Sahib *v.* Zubeda Bee, (1933) M.W.N. 121 ... 180
Mohana Reddi *v.* Gangaraju, (1941) 2 M.L.J. 311=I.L.R. (1942) Mad. 95 (F.B.) ... 286
Mohan Tagore *v.* Gnanendra Mohan Tagore, (1872) 9 Beng.L.R. 377 (P.C.) ... 436, 437
Mohendra Lal Mitter *v.* Anundo Coomar Mitter, (1897) I.L.R. 25 Cal. 236 (F.B.) ... 401
Mohim Chandra De *v.* Mohendra Kumar De Sarkar, (1929) I.L.R. 11 Lah. 402 ... 174, 175
Mooljee Bros. *v.* Shanmugham Pillai, (1932) 63 M.L.J. 587=I.L.R. 56 Mad. 169 ... 337, 338
Morrison *v.* Chadwick, (1849) 7 C.B. 266=137 E.R. 107 ... 518
Motho Koorey *v.* Tekait Ram Chunder Singh, (1872) I.L.R. 9 Cal. 411 ... 441
Motilal *v.* Mukund Singh, (1897) I.L.R. 19 All. 477 ... 10, 11
Mount Albert Borough Council *v.* Australian Temperance and General Mutual Life Assurance Society, (1938) A.C. 224 (P.C.) ... 33
Mt. Bassu Kuer *v.* Dhum Singh, (1889) L.R. 15 I.A. 211 at 218=I.L.R. 11 All. 47 (P.C.) ... 513
Mt. Bhagwati *v.* Mt. Ramkali, (1939) 2 M.L.J. 98=L.R. 66 I.A. 145=I.L.R. (1939) Kar. 299 (P.C.) ... 278
Mt. Daulat Kuer *v.* Bishundeo Singh, (1940) I.L.R. 19 Pat. 382 : A.I.R. 1940 Pat. 310 ... 3, 6, 182
Mt. Gangi *v.* Sanbi, A.I.R. 1929 Lah. 736 ... 69
Mudkaya Andanaya Hiremath, *In re*, A.I.R. 1927 Bom. 35 ... 484
Mufti Reazuddin *v.* Lala Maheshanand, (1928) I.L.R. 8 Pat. 533 ... 290
Mungal Pershad Dichit *v* Girija Kant Lahiri, (1881) L.R. 8 I.A. 123=I.L.R. 8 Cal. 51 (P.C.) ... 201
Municipal Council, Palni *v.* Sri Dhandayuthapani Devasthanam, (1940) 2 M.L.J. 897=I.L.R. (1941) Mad. 322 ... 408, 409
Municipal Council, Salem *v.* Gururajah Rao, (1934) 68 M.L.J. 118=I.L.R. 58 Mad. 469 ... 266
Municipal Council, Srirangam *v.* Srirangam Devasthanam, (1936) M.W.N. 1088 ... 409
Municipal Council of Tirupathi *v.* Sree Mahant Prayag Dasjee Varu, (1914) 27 M.L.J. 231. 409
Munni Bibi *v.* Trilokanath, (1931) 61 M.L.J. 196=L.R. 58 I.A. 158=I.L.R. 53 All. 103(P.C.). 38
Murugappa Chettiar *v.* Ramaswami Chettiar, (1935) I.L.R. 59 Mad. 342 ... 64
Mussamat Bodhia *v.* Ram Chandra Marwari, (1927) I.L.R. 6 Pat. 474 ... 290
Muthiah Bhagavathar *v.* Venkatrama Aiyar, (1935) 69 M.L.J. 303=I.L.R. 59 Mad. 121 ... 292, 294
Muthukrishna Aiyar *v.* Sankaralingam Pillai, (1912) 24 M.L.J. 135=I.L.R. 36 Mad. 229, 250 (F.B.) ... 300, 301
Muthuswamia Pillai *v.* Sankara Aiyar, (1942) 1 M.L.J. 86 ... 232
Mylappa Chettiar *v.* Aga Mirza Mohamed Shirazee, (1919) 37 M.L.J. 712 ... 354, 355

N

Nabakumar Singh Dhudhuria *v.* Fateh Singh Nahar, (1934) I.L.R. 61 Cal. 986 ... 23
Nafar Chandra Pal *v.* Siddhartha Krishna Mazumdar, (1920) I.L.R. 47 Cal. 974 ... 320

PAGE.

Nagaratnam v. Seshayya, (1939) 1 M.L.J. 272=I.L.R. (1939) Mad. 151 (F.B.) ... 110, 315
Nagaswami Iyer, *In re*, (1922) 31 M.L.T. 458 ... 383
Nagendranath De v. Suresh Chandra De, (1932) 63 M.L.J. 329=L.R. 59 I.A. 263=I.L.R. 60 Cal. 1 (P.C.) ... 98
Nagireddi v. Somappa, (1942) 2 M.L.J. 691 (F.B.) ... 269
Naima Khatun v. Sardar Basant Singh, (1933) I.L.R. 56 All. 766 (F.B.) ... 282
Namberumal Chetti v. Veeraperumal Pillai, (1930) 59 M.L.J. 596 ... 57
Nandalal v. Arunchandra, (1935) 41 C.W.N. 464 ... 69
Nandur Subbayya v. Raja Venkataramayya, (1917) 7 L.W. 16 ... 10
Nanhe v. Mangat Rai, (1913) 20 I.C. 647 ... 396
Nanjaya Mudali v. Shanmugha Mudali, (1913) 26 M.L.J. 576=I.L.R. 38 Mad. 684 (F.B.). 27
Narain Singh v. Ramlal, A.I.R. 1940 Lah. 460 ... 161
Narasayya v. Venkatakrishnayya, (1884) I.L.R. 7 Mad. 397 ... 50
Narasimham v. Narayan Rao, A.I.R. 1926 Mad. 66 ... 125
Narayana Aiyar v. Venkataramana Aiyar, (1901) I.L.R. 25 Mad. 220 at 234 ... 30
Narayanachari v. Annamalai Chettiar, (1939) 2 M.L.J. 225 ... 138
Narayana Gajapati Raju v. Narasimhulu, (1942) 2 M.L.J. 359 ... 254
Narayana Iyengar v. Desikachariar, (1933) 65 M.L.J. 315 ... 404
Narayanaraju v. Suryanarayudu, (1939) 2 M.L.J. 901=L.R. 66 I.A. 278=I.L.R. (1940) Mad. 1 (P.C.) ... 91
Narayana Reddi v. Audilakshmi Ammal, (1928) 55 M.L.J. 102=I.L.R. 51 Mad. 462 ... 273
Narayanaswami Aiyar v. Sevadappa Gounder, (1941) 2 M.L.J. 932 ... 5
Narendrabai Sarabai v. Chinnubai Manibai, (1936) I.L.R. 60 Bom. 894 ... 401
Nataraja Pillai v. Rangaswami Karamandar, (1941) 2 M.L.J. 682 ... 452
Natesa Aiyar v. Appavu Padayachi, (1913) 24 M.L.J. 488=I.L.R. 38 Mad. 178, 185 (F.B.). 302
Nathji Muleshwar v. Lalbhai Ravidat, (1889) I.L.R. 14 Bom. 97 ... 187
National Insurance Co., Ltd., Calcutta v. Seethammal, (1933) 65 M.L.J. 455. 354, 355, 356
Navaneetha Krishna v. Ramanujulu Chetty, (1941) 2 M.L.J. 159 at 161 ... 334
Neale v. Mackenzie, (1836) 1 M. & W. 747=150 E.R. 635 ... 518, 519
Neelakandan Nambudripad v. Krishna Aiyar, (1943) 1 M.L.J. 325 ... 329
Neelamma v. Mareppa, (1935) 70 M.L.J. 128 ... 287
Nellayyappa Pillai v. Thangamma Nachiar, (1897) 8 M.L.J. 119=I.L.R. 21 Mad. 406 ... 390, 391
Nidasanametla Venkata Seshayya v. District Board, East Godavari, (1939) 1 M.L.J. 82 ... 471
Niharendu Dutta Majumdar v. King-Emperor, (1942) 5 F.L.J. 47=55 L.W. 344 ... 417
Nisar Ahmad Khan v. Raja Mohan Manucha, (1940) L.R. 67 I.A. 431=I.L.R. (1940) Kar. 419 (P.C.). 511, 512, 513
Niser Ahmed Khan v. Rahmat Begum, A.I.R. 1927 Oudh 146 ... 423
Noyes v. Pollock, (1884) 32 Ch.D. 53 ... 476
Nussurwanjee Prestonjee v. Meer Mynoodeen Khan, (1855) 6 M.I.A. 134 at 155 ... 67, 68

O

Official Assignee of Madras v. Allu Ramachandra Aiyar, (1922) 43 M.L.J. 569=I.L.R. 46 Mad. 54 ... 29
Official Assignee, Madras v. Narasimha Mudaliar, (1929) 57 M.L.J. 145=I.L.R. 52 Mad. 717 (F.B.) ... 31
Official Receiver, Anantapur v. Ramachandrappa, (1928) 55 M.L.J. 721=I.L.R. 52 Mad. 246 ... 29
Official Receiver, Coimbatore District v. Kanga, (1921) 42 M.L.J. 53=I.L.R. 45 Mad. 167. 218
Official Receiver of Guntur v. Sait Lalchand Kushalchand, A.I.R. 1943 Mad. 94=1942 M.W.N. 470 ... 285, 286
Official Receiver of Ramnad v. Narayanaswami Tevar, (1941) 2 M.L.J. 1018 ... 445

P

Pachayammal v. Hindustan Co-operative Insurance Co., Ltd., Madras, (1940) 2 M.L.J. 688=I.L.R. (1941) Mad. 109 ... 355
Padmavathi v. Srinivasa Kamathi, (1921) 14 L.W. 575=26 C.W.N. 369 (P.C.). 273, 274, 275
S.P.P.L. Palaniappa Chettiar v. Official Receiver, Madura, (1937) 2 M.L.J. 427 ... 28
Palaniappa Mudali v. Official Receiver, Trichinopoly, (1916) 32 M.L.J. 84 ... 31
Palani Goundan v. Peria Goundan, (1940) 2 M.L.J. 887 ... 139
Palanivelu Odayar v. Official Receiver, West Tanjore, (1931) 61 M.L.J. 763 ... 31
Panchanada Velan v. Vaithinatha Sastrigal, (1905) 16 M.L.J. 63=I.L.R. 29 Mad. 333 (F.B.). 4, 5, 6, 326, 327
Pandiyan Pillai v. Vellayyappa Rowther, (1917) 33 M.L.J. 316 ... 214
Papayya v. Ramanna, (1884) I.L.R. 7 Mad. 85 ... 444
M. C. Patail v. H. G. Ariff, (1935) I.L.R. 13 Rang. 744 ... 376
Pavayi v. Palanivelu, (1940) 1 M.L.J. 766=I.L.R. (1940) Mad. 308 ... 136
Mrs. J. Peliti v. Kanshi Gopal, A.I.R. 1939 Lah. 210 ... 65
Perayya v. Venkata, (1888) I.L.R. 11 Mad. 403 ... 156, 157
Percival Lim. v. London County Council Asylums and Mental Deficiency Committee, (1918) 87 L.J. K.B. Rep. 677 ... 307, 308

PAGE.

Perianna v. Sellappa, (1938) 2 M.L.J. 1068=I.L.R. (1939) Mad. 218 ... 139, 280
Periaswami Chettiar v. Ramaswami Goundan, (1940) 2 M.L.J. 513 ... 138
Philling v. Armitage, (1805) 12 Ves. 78=33 E.R. 31 ... 206
Phillips v. Bury, (1694) Shower P.C. 35=1 E.R. 24 ... 440
Phillips v. Bury, (1690) 1 Shower 360 ... 440
Phul Kumari v. Ghanshyam Misra, (1907) 17 M.L.J. 618=L.R. 35 I.A. 22=I.L.R. 35 Cal. 202 (P.C.) ... 251
Pindi Das v. Emperor, A.I.R. 1938 Lah. 629 ... 343
Plimner v. Mayor of Vellington, (1884) 9 A.C. 699 ... 206
Ponnuswami Asari v. Palaniandi Mudali, (1920) 11 L.W. 602 ... 430
Ponnuswami Pillai, *In re*, (1940) 52 L.W. 345 ... 483
Prakash v. Emperor, (1930) 127 I.C. 209 ... 344
Pramathanath Mukerjee v. Amir Chandra Banerjee, (1923) 40 C.L.J. 564 ... 440
Pratap Bhattudu v. A. E. L. Mission, (1924) I.L.R. 49 Mad. 38 ... 69
Proctor v. Manwaring, (1819) 3 B. and Ald. 145=106 E.R. 616 ... 21
Proctor Loan Co. v. Grice, (1880) 5 Q.B.D. 592 ... 301
Province of Madras v. Boddu Paidanna and Sons, (1942) 2 M.L.J. 327 (F.C.) ... 346
Province of Madras v. Maharajah of Jeypore, (1943) 1 M.L.J. 53 ... 252
Public Prosecutor v. B. V. A. Lury and Company, (1941) 2 M.L.J. 487 ... 119
Public Prosecutor v. Varadarajulu Naidu, (1924) 47 M.L.J. 470=I.L.R. 47 Mad. 716 ... 407
Punjab Co-operative Bank, Ltd. v. Commissioner of Income-tax, Lahore, I.L.R. (1940) Lah. 685 ... 315
Puramannadas Jiwandas v. Jamnabai, (1885) I.L.R. 10 Bom. 49 ... 94
Purushottam Ratho v. Brindavana Doss, (1931) 33 L.W. 664 ... 86

Q

Queen v. Damers, (1900) A.C. 103 ... 307
Queen v. Norfolk County Council, (1891) 60 L.J. Q.B. 379 ... 270
Queen-Empress v. Chenchi Reddi, (1900) I.L.R. 24 Mad. 238 ... 484
Queen-Empress v. Khimat Singh, (1889) A.W.N. 54 ... 129
Quinion v. Horne, (1906) 1 Ch. 596 ... 465

R

Radha Krishan Das v. Rai Krishan Chand, (1901) L.R. 28 I.A. 182=I.L.R. 23 All. 415 (P.C.) ... 402
Raghavan Pattar v. Arumugham, (1934) 68 M.L.J. 283 ... 301
Raghunatha v. Sadagopa, (1911) 21 M.L.J. 983=I.L.R. 36 Mad. 348 ... 281, 283
Raghunath Das v. Sundar Das Khetri, (1914) 27 M.L.J. 150=L.R. 41 I A. 251=I.L.R. 42 Cal. 72 (P.C.) ... 84, 85
Raghuraj Chandra v. Subhadra Kunwar, (1928) 55 M.L.J. 778=L.R. 55 I.A. 139=I.L.R. 3 Luck. 76 (P.C.) ... 3, 183
Rajagopala Ayyar v. Ramanujachari, (1923) 46 M.L.J. 104=I.L.R. 47 Mad. 288 (F.B.) ... 85
Raja Raghunandan Prasad Singh v. Commissioner of Income-tax, Bihar and Orissa, (1933) 64 M.L.J. 544=L.R. 60 I.A. 133=I.L.R. 12 Pat. 305 (P.C.) ... 452
Rajah of Ramnad v. Subramaniam Chettiar, (1928) I.L.R. 52 Mad. 465 ... 55, 251, 252
Rajah Vurmah Valia v. Ravi Varmah Kunhikutti, (1876) L.R. 4 I.A. 76=I.L.R. 1 Mad. 235 (P.C.) ... 438, 440
Rajendranath Chatterjee v. Mahes Lata Debi, (1925) I.L.R. 53 Cal. 270 ... 431
Rajpali Kunwar v. Sarjurai, (1936) I.L.R. 58 All. 1041 ... 183
Raj Raghubar Singh v. Jai Indra Bahadur Singh, (1919) 38 M.L.J. 302=L.R. 46 I.A. 228=I.L.R. 42 All. 158 (P.C.) ... 117, 118
Ramabhadrachar v. Srinivasa Aiyangar, (1900) I.L.R. 24 Mad. 85 ... 292, 293, 294, 295
Ramabrahmam Chatterjee v. Kedar Nath Banerjee, (1922) 36 C.L.J. 478 ... 439
A. N. Ramachandra Iyer v. Official Assignee, Madras, (1930) 61 M.L.J. 66=I.L.R. 54 Mad. 739 ... 31
Ramachandra Martand Waikar v. Vinayak Venkatesh Kothekar, (1914) 27 M.L.J. 333=L.R. 41 I.A. 290=I.L.R. 42 Cal. 384 (P.C.) ... 366, 368, 372
Ramachandram Pillai v. Kalimuthu Chettiar, (1911) 21 M.L.J. 246=I.L.R. 35 Mad. 47 ... 360
Ram Adhar v. Sudeshra, (1933) I.L.R. 55 All. 725 (F.B.) ... 2, 6, 181, 182, 183, 185
Ramajogayya v. Jagannadham, (1918) 36 M.L.J. 29=I.L.R. 42 Mad. 185 ... 340, 341
Ramakrishna Aiyar v. Venkata Somayajulu, A.I.R. 1934 Mad. 31 (F.B.) ... 300
Ramakrishna Nadar v. Ponnayya Thirumagal Vandaya Thevar, (1935) 69 M.L.J. 791 ... 429
Ramakrishnayya v. Naganna, (1933) 65 M.L.J. 775 ... 81
Ramamurti v. Sitaramayya, (1940) 2 M.L.J. 293=I.L.R. (1940) Mad. 947 ... 174
Ramanamma v. Appalanarasayya, (1931) 62 M.L.J. 230=I.L.R. 55 Mad. 346 ... 187
Ramanatha v. Palaniappa, I.L.R. (1939) Mad. 776 ... 341
Ramanatha Gurukkal v. Arunachalam Chettiar, (1938) 2 M.L.J. 516=I.L.R. (1939) Mad. 81 and (1940) 1 M.L.J. 352=I.L.R. (1940) Mad. 825 ... 501, 502
Ramanathan Chetti v. Murugappa Chetti, (1906) 16 M.L.J. 265=L.R. 33 I.A. 139=I.L.R. 29 Mad. 283 (P.C.) ... 438, 443

PAGE.

V. E. N. K. R. M. A. Ramanathan Chettiar *v.* The Madura Sri Meenakshi Sundareswarar Devasthanam, (1937) 2 M.L.J. 887 ... 506
Ramanatham Pillai *v.* Doraiswami Ayyangar, (1919) 38 M.L.J. 65=I.L.R. 43 Mad. 325 ... 118
Ramasubbier *v.* Rama Iyer, (1941) 1 M.L.J. 718 ... 190
Ramaswami *v.* Rangachariar, (1940) 1 M.L.J. 32=I.L.R. (1940) Mad. 259 (F.B.) ... 249, 296
Ramaswami *v.* Veeranna, (1927) 53 M.L.J. 766 ... 97
Ramaswami Aiyar *v.* Abdul Aziz Sahib, (1916) 3 L.W. 191 ... 10
Ramaswami Chetty *v.* Karuppa Chetty, (1915) 29 M.L.J. 551 ... 5, 327
Ramaswami Reddi *v.* Rangamannar Iyengar, (1914) 26 M.L.J. 255 ... 201
Ramchand *v.* Emperor, I.L.R. (1939) Lah. 513 ... 161
Rameshar *v.* Ganapati Devi, (1936) I.L.R. 18 Lah. 525 ... 183
Ramaswaram Devasthanam *v.* Secretary of State, A.I.R. 1927 Mad. 1167 ... 388
Ramier *v.* Muthukrishna Iyer, (1932) 62 M.L.J. 687=I.L.R. 55 Mad. 801 (F.B.) ... 200, 203
Ramireddi *v.* Sreeramulu, A.I.R. 1933 Mad. 120 ... 404
Ramlal Thakursidar *v.* Lakshmichand Muniram et al, (1861) 1 Bom.H.C.R. 51 at p. 71 (App.) ... 376
Rampershad Tewarry *v.* Sheochurn Doss, (1866) 10 M.I.A. 490 ... 74
Ramsden *v.* Dyson, (1865) L.R. 1 H.L. 129 ... 206
Ranganatha Iyer *v.* Srinivasa Iyengar, (1925) 49 M.L.J. 656 ... 213, 214
Ranganatha Thathachariar *v.* Krishnaswami Thathachariar, (1923) I.L.R. 47 Mad. 139 at 146 ... 506
Ranganayaki Ammal *v.* The Official Assignee of Madras, (1930) 61 M.L.J. 354 ... 266
Rangappa Naicker *v.* Sri Sowdambigai Nidhi, Ltd., A. A. A. O. No. 112 of 1938 ... 163
Ranga Rao, *In re*, (1908) 4 M.L.T. 91 ... 383
Rangaswami Goundan *v.* Errappa Gounder, (1934) 67 M.L.J. 426 ... 251
Rangaswami Goundan *v.* Kandaswami Goundan, (1942) 2 M.L.J. 361 ... 270
Rangaswami Goundan *v.* Ramanathan, (1934) 67 M.L.J. 426 ... 55
Rangiah Chetti *v.* Thanikachala Mudali, (1895) I.L.R. 69 Mad. 74 ... 29, 30
Ranodip Singh *v.* Parameshwar Pershad, (1924) 48 M.L.J. 29=L.R. 52 I.A. 69=I.L.R. 47 All. 165 (P.C.) ... 159
Raoji Bapuji Pandarkar *v.* K. L. Bowachekar, A.I.R. 1935 Bom. 316 ... 28
Ratnaswami Nadan *v.* The Prince of Arcot's Endowments, (1938) 2 M.L.J. 148=I.L.R. (1938) Mad. 1094 ... 427
Redfern *v.* Redfern, (1890) 63 L.T. 780 ... 361
Revenue Divisional Officer, Vizagapatam *v.* Zamindar of Chemdu, I.L.R. (1938) Mad. 479. 278
Rex *v.* Peto, (1826) 1 Y. & J. 38=148 E.R. 577 ... 311
Rhode Island *v.* Massachussetts, (1838) 21 Peters U.S. 657, 718 ... 202
Richards *v.* May, (1883) 10 Q.B.D. 400 ... 311
Roda *v.* Autar Singh, A.I.R. 1938 Lah. 839 ... 161
Rustomji Dossabhai *v.* Bai Moti, I.L.R. (1940) Bom. 50 ... 337
Ryots of Garabanda, etc., villages *v.* Zamindar of Parlakimidi, (1938) 1 M.L.J. 68=I.L.R. (1938) Mad. 858 ... 113

S

Sabapathi Chetti *v.* Shanmugham Chetti, (1923) 46 M.L.J. 453 ... 10
Sadasib Mandal *v.* Emperor, (1913) 26 I.C. 168 ... 161
Sadasiva Bin Mahadu *v.* Narayan Vithal, (1911) I.L.R. 35 Bom. 452 ... 11
Sadasuk Jankidas *v.* Sir Kishan Pershad, (1918) 36 M.L.J. 429=L.R. 46 I.A. 33=I.L.R. 46 Cal. 663 (P.C.) ... 61, 62
Sakhisona Dasi *v.* Prankrishna Das, (1933) 37 C.W.N. 301 ... 518
Saminatha Pillai *v.* Sundaresa Pillai, (1920) 14 L.W. 238 (F.B.) ... 390, 391
Sankar *v.* Raghoba, A.I.R. 1938 Nag. 97 ... 185
Sankara Iyer *v.* Yegappa Servai, (1940) 2 M.L.J. 874 ... 191
Sankaralinga Mudaliar *v.* Narayana Mudaliar, (1922) 43 M.L.J. 369=I.L.R. 45 Mad. 913 (F.B.) ... 123
Sankaranarayana *v.* Official Receiver, South Kanara, (1932) 36 L.W. 581 ... 30
Sankunni Menon *v.* The Empire of India Life Assurance Co., Ltd., (1931) 61 M.L.J. 388. 300
Santha Mohideen Pillai *v.* Jamal Mohammad Jamaluddin, A.I.R. 1928 Mad. 1092 ... 381
Sarat Chunder Dey *v.* Gopal Chunder Laha, (1892) L.R. 19 I.A. 203=I.L.R. 20 Cal. 296 (P.C.) ... 221, 222
Sariatoolla Moole *v.* Raj Kumar Roy, (1899) I.L.R. 27 Cal. 709 ... 11
Satnarain *v.* Behari Lal, (1924) 47 M.L.J. 857=L.R. 52 I.A. 22=I.L.R. 6 Lah. 1 (P.C.). 28, 29, 107, 108
Sat Narain *v.* Sri Kishen Das, (1936) 71 M.L.J. 812=L.R. 63 I.A. 384=I.L.R. 17 Lah. 644 (P.C.) ... 29
Satyanarayana *v.* Chinna Venkatarao, (1925) 50 M.L.J. 674=I.L.R. 49 Mad. 302 ... 471
Savumian *v.* Narayanan Chettiar, (1913) 23 I.C. 248=15 M.L.T. 372 ... 106
Scott *v.* Scott, (1913) A.C. 417, 456 ... 402
Seaman *v.* Netherclift, (1876) 2 C.P.D. 53 ... 187

PAGE.

Secretary of State v. Bhagwan, A.I.R. 1932 All. 597 at 598 ... 67, 68
Secretary of State v. Madho Ram, (1928) I.L.R. 10 Lah. 493 ... 307, 308
Secretary of State for India v. Mask and Co., (1940) 2 M.L.J. 140=L.R. 67 I.A. 222=I.L.R. (1940) Mad. 599 (P.C.) ... 502, 503
Secretary of State for India v. Subbarayudu, (1931) 62 M.L.J. 213=L.R. 59 I.A. 56=I.L.R. 55 Mad. 268 (P.C.) ... 349
Secretary of State for India v. Swami Naratheswarar, (1910) 20 M.L.J. 766=I.L.R. 34 Mad. 21 ... 350
Secretary of State for India in Council v. Amarnath, (1935) I.L.R. 15 Pat. 353 ... 55
Secretary of State for India in Council v. Bhagwan Prasad, (1929) I.L.R. 52 All. 96 ... 67, 68
Seetharama Reddi v. Venku Reddi, (1901) 11 M.L.J. 344 ... 213, 214
Sepulchre Bros. v. Kushala Das, (1941) 2 M.L.J. 481=I.L.R. (1942) Mad. 243 ... 354, 355
Seshayya v. Swamireddi, (1941) 2 M.L.J. 795 ... 232
Sethuramaswamiar v. Meruswamiar, (1917) 34 M.L.J. 130=L.R. 45 I.A. 1=I.L.R. 41 Mad. 296, 303 (P.C.) ... 438
Sevadappa Goundar v. Narayanaswami Aiyar, (1940) 1 M.L.J. 647 ... 327
Shafiq-ullah Khan v. Swami-ullah Khan, (1929) I.L.R. 52 All. 139 ... 222
Shah Abu Ilyas v. Ulfat Bibi, (1896) I.L.R. 19 All. 50 ... 180
Shah Ghulam Rahimatullah Sahib v. Mohamed Akbar Sahib, (1875) 8 M.H.C.R. 63 ... 437
Shankar v. Daooji Misir, (1931) 61 M.L.J. 212=L.R. 58 I.A. 206=I.L.R. 53 All. 290 (P.C.). 220
Shankar v. Raghoba, A.I.R. 1938 Nag. 97 ... 3, 182
Shankar Ganesh Dabib v. Secretary of State for India, (1922) 44 M.L.J. 32=L.R. 49 I.A. 319=I.L.R. 49 Cal. 845 (P.C.) ... 398
Shanmuga Pillai v. Ramanathan Chettiar, (1894) 4 M.L.J. 91=I.L.R. 17 Mad. 309 ... 50
Shanmukham Chetti v. Govinda Chetti, I.L.R. (1938) Mad. 39 ... 389, 392
Shaw v. Bunny, (1864) 33 Beav. 494=55 E.R. 460 ... 479
Shewkissen v. Mangachand, (1940) 45 C.W.N. 478 ... 376
Shivaji Yesji Charan v. Collector of Ratnagiri, (1886) I.L.R. 11 Bom. 429 ... 388
Shiva Narain Jafa v. Judges of the High Court of Judicature at Allahabad, (1936) I.L.R. 58 All. 307 ... 491
Sivagurunatha v. Padmavathi, (1941) 1 M.L.J. 441=I.L.R. (1941) Mad. 513 (F.B.) ... 62
Soorajomonee Dasee v. Denubundo Mullick, (1857) 6 M.I.A. 526 at 555 ... 437, 442
Sreenarain Mitter v. Sreemurthy Kishen Soondery Dasee, (1873) 11 Beng.L.R. 171 (P.C.) ... 86
Sreenivasachariar v. Evalappa Mudaliar, (1922) 43 M.L.J. 536=L.R. 49 I.A. 237=I.L.R. 45 Mad. 565 (P.C.) ... 443
Sreepathi Chatterjee v. Krishnachandra Banerjee, (1924) 41 C.L.J. 22 ... 440
Sree Rajah Vasi Reddi v. Mallela Lakshminarasimham, (1940) 1 M.L.J. 820=I.L.R. (1940) Mad. 913 ... 224
Srimati Sakuntala Devi v. Kaushalya Devi, (1936) I.L.R. 17 Lah. 356 ... 183
Srinivasa Iyengar v. Radhakrishna Pillai, (1913) 26 M.L.J. 47=I.L.R. 38 Mad. 667 ... 156, 157
Srinivasalu Naidu v. Damodarasami Naidu, (1938) M.W.N. 708 ... 338
Srinivasayya v. Obula Raju, (1941) 2 M.L.J. 164 ... 109
Sriramachandra Rao v. Venkateswara Rao, (1938) 2 M.L.J. 1048=I.L.R. (1939) Mad. 252. 98
Sri Thakur Ramakrishna Murarji v. Ratanchand, (1931) 61 M.L.J. 665=L.R. 58 I. A. 173=I.L.R. 53 All. 190 (P.C.) ... 376
St. John's College v. Todington, (1757) 1 Burr. 158=97 E.R. 245 ... 439
Stanley v. Grundy, (1883) 22 Ch.D. 478 ... 476
Stewards and Co. v. The Queen, (1900) 17 T.L.R. 111 ... 308
Re Stockton Iron Furnace Co., (1878) 10 Ch.D. 127 ... 476
Stollmeyer v. Trinidad Lake Petroleum Company, (1918) A.C. 485 (P.C.) ... 348
Subba Narayana Vadhiar v. Ramaswami Iyer, (1906) 16 M.L.J. 508=I.L.R. 30 Mad. 88 (F.B.) ... 61, 62
Subbaraju v. Venkataramaraju, (1928) 55 M.L.J. 429=I.L.R. 51 Mad. 800 ... 174
Subbaraya v. Kylasa, (1891) 2 M.L.J. 89=I.L.R. 15 Mad. 300 ... 185
Subbarayadu v. Bapayya, A.I.R. 1927 Mad. 149 ... 201
Subbarayadu v. Narasimha Rao, (1924) 47 M.L.J. 558 at 561 ... 44
Subbayya v. Kristaya, (1926) 52 M.L.J. 390 ... 388
Subbayya Naicker v. Sankarappa Naicker, (1933) 66 M.L.J. 175 ... 456
Subba Singh v. Sarafraz Kunwar, (1896) I.L.R. 19 All. 215 ... 184
Subrahmaniam v. Subbayi, 1933 M.W.N. 934 ... 404
Subramania Aiyar v. Swaminatha Chettiar, (1928) 28 L.W. 885 ... 203
Subramania Iyer v. Dharmapuram Janopakara Nidhi, Ltd., (1928) M.W.N. 216 ... 451
Subramania Iyer v. India Equitable Insurance Co., Ltd., (1941) 2 M.L.J. 509 ... 174
Subramaniam v. Damavarapu Reddi, (1935) 68 M.L.J. 597 ... 194
A. L. S. P. B. L. Subramaniam Chettiar v. Subraya Goundan, A.I.R. 1935 Mad. 246 ... 28
Sudhama Upadhya v. Queen-Empress, (1895) I.L.R. 23 Cal. 328 ... 484
Sukhbir Singh v. Secretary of State for India in Council, (1926) I.L.R. 49 All. 212 ... 67, 68
Suleman v. Abdul Latif, (1930) 59 M.L.J. 121=L.R. 57 I.A. 245=I.L.R. 58 Cal. 208 (P.C.). 19
Sullivan v. Norton, (1886) I.L.R. 10 Mad. 28 (F.B.) ... 188
Sultan Sahib Marakayar v. Chidambaram Chettiar, (1908) 19 M.L.J. 224=I.L.R. 32 Mad. 136 ... 19

PAGE.

Sundara Naicker *v*. Potti Naicker, (1926) 51 M.L.J. 561=I.L.R. 50 Mad. 494 ... 319
Sundararajan *v*. Mohamed Ismail Saheb, (1939) M.W.N. 1115 ... 124
Suraj Bansi Koer *v*. Sheo Prasad Singh, (1879) L.R. 6 I.A. 88=I.L.R. 5 Cal. 148 (P.C.). ... 108
Swaminatha Odayar *v*. Natesa Iyer, (1933) 65 M.L.J. 350 ... 86
Syed Ghulam Khadir Sahib *v*. Viswanatha Iyer, (1942) 2 M.L.J. 768 ... 237, 445
Syed Hyder Ali Sahib *v*. Secretary of State for India, (1933) M.W.N. 1457 ... 350

T

Tagore *v*. Tagore, (1872) 9 Beng.L.R. 377 (P.C.). 441, 442, 443, 444
Tancred, Arrol and Co. *v*. The Steel Company of Scotland, Limited, (1890) 15 A.C. 125 ...307, 309
Thangishettithi *v*. Duja Shetti, (1918) 35 M.L.J. 575 ... 10, 11
Thayarammal *v*. Lakshmi Ammal, (1920) 39 M.L.J. 181=I.L.R. 43 Mad. 822 ... 471
Thayyanayaki Ammal *v*. Sundarappa, (1941) 2 M.L.J. 913=I.L.R. (1942) Mad. 544 ... 136
Thorn *v*. The Commissioners of Public Works, (1863) 32 Beav. 490=55 E.R. 192 ... 307, 308
Thumbalam Gooty Thimmia *v*. The Official Receiver, (1939) 1 M.L.J. 158 ... 243
Tika Sao *v*. Harilal, (1940) I.L.R. 19 Pat. 752 (F.B.) ... 337, 338
Re Tilakchand Koyal : *Ex parte* the Official Assignee, (1941) 46 C.W.N 256 ... 29
Tirappayya *v*. Mallidi Ramaswami, (1913) 24 M.L.J. 428 ... 86
Tiruvengada Mudali *v*. Tripurasundari Ammal, (1926) 51 M.L.J. 112=I.L.R. 49 Mad. 728 (F.B.) ... 187
Tortman *v*. Dunn, (1815) 4 Camp. 211=171 E.R. 67 ... 187
Trebeck *v*. Croudace, (1918) 1 K.B. 158 ... 448
Tuljaram Rao *v*. Alagappa Chettiar, (1910) 21 M.L.J. 1=I.L.R. 35 Mad. 1 ... 401

U

Udayamuthier *v*. Shunmugam Chettiar, (1934) 41 L.W. 610 ... 159
Uma Datt *v*. Mt. Zakia Bibi, A.I.R. 1936 All. 737 ... 290
Umaid Bahadur *v*. Udoi Chand, (1880) I.L.R. 6 Cal. 119 (F.B.) ... 371, 372
Umderhill *v*. Langridge, (1859) 29 L.J. (N.S.) (M.C.) 65 ... 21
United Provinces *v*. Atiqa Begum, (1940) F.C.R. 110=3 F.L.J. 97 ... 346
Unity Bank *v*. King, (1858) 25 Beav. 72=53 E.R. 563 ... 205, 206
Upton *v*. Townend, (1855) 17 C.B. 30=104 E.R. 562 ... 518
Usman Khan *v*. Dasanna, (1912) 23 M.L.J. 360=I.L.R. 37 Mad. 545 ... 156, 157

V

Vadilal *v*. Fulchand, (1905) I.L.R. 30 Bom. 56 ... 395, 396
Vaithinatha Aiyar *v*. Govindasami Odayar, (1921) 42 M.L.J. 551 ... 300, 301
Valluri Narasimharao *v*. Ryots of Peddamidipalli, (1925) I.L.R. 49 Mad. 499 ... 113
Varamma *v*. Gopaladasayya, (1918) 35 M.L.J. 57=I.L.R. 41 Mad. 659 (F.B.) ... 159
Vasudeo Atmaram Joshi *v*. Eknath Balakrishna Thite, (1910) I.L.R. 35 Bom. 79 ... 213, 214
Vasudeva *v*. Sankara, (1897) 7 M.L.J. 102=I.L.R. 20 Mad. 129 (F.B.) ... 297
Vedantam Ramacharyulu *v*. Kasturi Narasimha Suryanarayana, (1933) M.W.N. 183 ... 506
Veerappa Naidu *v*. Avudayammal, (1924) 48 M.L.J. 106=I.L.R. 48 Mad. 262 (F.B.) ... 123
Veerappa Setti *v*. Munisami Achari, (1934) 69 M.L.J. 19=I.L.R. 58 Mad. 301 ... 97
Veeraraghavalu *v*. Sreeramulu, A.I.R. 1928 Mad. 816 ... 250
Veerasami *v*. Ramanna, (1934) 68 M.L.J. 444=I.L.R. 58 Mad. 721 (F.B.) ... 395
Veerayya *v*. Srinivasa Rao, (1935) 69 M.L.J. 364=I.L.R. 58 Mad. 908 (F.B.) ... 128
Vellavan Chettiar *v*. Mahalinga Pathan, (1938) 1 M.L.J. 171 ... 362
Venkatadri Appa Rao *v*. Parthasarathi Appa Rao, (1925) 48 M.L.J. 627=L.R. 52 I.A. 214=I.L.R. 48 Mad. 312 (P.C.) ... 38, 39
Venkatadri Somappa *v*. The Official Receiver, Bellary, (1938) 2 M.L.J. 362 ... 471
Venkatakrishna Reddi *v*. Srinivasachariar, (1930) 61 M.L.J. 135=I.L.R. 54 Mad. 527 ... 456
Venkatakrishnayya *v*. Saik Ali Sahib, (1938) 48 L.W. 277 ... 250
Venkata Narasimha Rao *v*. Krishnabayamma, A.I.R. 1929 Mad. 479 ... 431
Venkatanarayana *v*. Somaraju, (1937) 2 M.L.J. 251=I.L.R. (1937) Mad. 880 (F.B.) ...269, 270
Venkatappayya *v*. Venkata Ranga Rao, (1928) 56 M.L.J. 218=L.R. 56 I.A. 21=I.L.R. 52 Mad. 175 (P.C.). 273, 274, 275
Venkatarajagopala Krishna Yachendra Bahadur Varu *v*. Venkataseshacharlu, (1941) 2 M.L.J. 655 ... 45
Venkataramana Reddi *v*. Rangiah Chetti, (1921) 41 M.L.J. 399 ... 102
Venkatarangayya Appa Rao Bahadur *v*. Marampudi Bajiraju, (1923) 45 M.L.J. 238 ... 44
Venkatarajulu *v*. Narasimha, (1880) I.L.R. 2 Mad. 174 ... 10
Venkata Reddi *v*. Nataraja Setty, (1924) 46 M.L.J. 371 ... 354, 355
Venkataswami *v*. Krishtayya, (1893) 3 M.L.J. 169=I.L.R. 16 Mad. 341 ... 471
Venkataswami Naicken *v*. Emperor, (1942) M.W.N. 123 ... 127
Venkatavaragappa *v*. Thirumalai, (1886) I.L.R. 10 Mad. 112 ... 45
Venkatesa Aiyangar *v*. Manikkavachakam Chetty, (1935) 68 M.L.J. 738 ... 170
Venkateswarlu *v*. Venkataraju, (1941) 1 M.L.J. 718 ... 190
Venkatraju *v*. Maharaja of Pithapuram, (1938) 1 M.L.J. 256=I.L.R. (1938) Mad. 381 (F.B.) ... 112

PAGE.

Vidyapurna *v.* Vidyanidhi, (1903) 14 M.L.J. 105=I.L.R. 27 Mad. 435 ... 438, 443
Vijayaraghavalu Naidu, *Re*, (1912) 26 M.L.J. 63=I.L.R. 37 Mad. 156 ... 446
Vythinatha Thambiran *v.* Mayandi Chetti, (1906) I.L.R. 29 Mad. 373 ... 320
Vythilinga *v.* Ramanuja, A.I.R. 1929 Mad. 845 ... 404
Vythilinga Pandara Sannadhi *v.* Ranganatha Mudaliar, (1933) 66 M.L.J. 98=I.L.R. 57 Mad. 362 ... 502
Vythilinga Pandara Sannadhi *v.* The Temple Committee, Tinnevelly Circle, (1931) 61 M.L.J. 815=I.L.R. 54 Mad. 1011 ... 502, 503

W

Wahid-ud-din *v.* Makhan Lal, I.L.R. (1938) All. 781 ... 173
Wakefield *v.* Kumar Rani Sayeeda Khatun, (1936) I.L.R. 15 Pat. 786 ... 338
Walchand Molaji *v.* Charles A. Williams, (1935) I.L.R. 59 Bom. 517 ... 266
Walker *v.* Sur, (1914) 2 K.B. 930 ... 427
Wandsworth Board of Works *v.* United Telephone Co., (1884) 13 Q.B.D. 904 ... 407
Watson *v.* Wand, (1853) 8 Ex. 335=155 E.R. 1375 ... 518
Wellingford *v.* Directors, etc., of Mutual Society, (1880) 5 A.C. 685 ... 301
Wolmirshausen *v.* Gullick, (1893) 2 Ch. 514 ... 134
Woolridge *v.* Norris, (1868) L.R. 6 Eq. 410 ... 134

Z

Zamindar of Kallikote *v.* Beero Pollai, (1935) 71 M.L.J. 118=I.L.R. 59 Mad. 825 (F.B.) ... 113
Zamindar of Polavaram *v.* Maharajah of Pittapur, (1930) 60 M.L.J. 56=I.L.R. 54 Mad. 163. 341
Zamindar of Polavaram *v.* Maharajah of Pittapur, (1936) 71 M.L.J. 347=L.R. 63 I.A. 304=I.L.R. 59 Mad. 910 (P.C.) ... 340, 341
Zamindar of Sivaganga *v.* Muthayyan Chettiar, (1936) 43 L.W. 535 ... 55

THE
Madras Law Journal Reports

I] JANUARY [1943

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE LAKSHMANA RAO AND MR. JUSTICE SOMAYYA.

Pappammal *alias* Muthu Karuppayyee Ammal .. *Appellant** (*Plff.*)

v.

Meenammal and others .. *Respondents* (*Defts.* 1 *to* 7 *and* 16).

Hindu Law of Inheritance (Amendment) Act (II of 1929), *section* 2—*"Sister"—Includes half-sister by the same father.*

Practice—Suits decreed by single judgment—Appeal against one decree only—Decrees in other suits when do not operate as res judicata.

The Hindu Law of Inheritance (Amendment) Act must be construed strictly but in accordance with Hindu conceptions. The word "sister" in the Act includes a half-sister by the same father.

Angamuthu Muthirian v. *Sinnapennammal,* (1937) 47 L.W. 286, overruled.

Amrit v. *Mst. Thagan,* I.L.R. 1938 Nag. 115 (F.B.), approved.

[*Per Krishnaswami Ayyangar and Kunhi Raman, JJ., on preliminary objection*: Three suits in which the same question, whether the plaintiff the admitted half-sister of the last male holder was entitled to his estate under Act II of 1929 in preference to the admitted agnates arose, were tried together and disposed of by tht same judgment and after deciding only this issue all the three suits were dismissed without deciding the other issues and separate decrees were passed in each of them. In view of the pendency of an appeal to the High Court against one of the decrees, the appeals preferred to the District Court against the other two decrees were withdrawn to the High Court, but as sufficient court-fee had not been paid on those appeals and the deficiency was not made up those appeals were ultimately rejected. In the circumstances,

Held, that the appeal to the High Court was not barred by *res judicata* by reason of the decrees in the other two suits having become final.]

Panchanada Velan v. *Vaithinatha Sastrial,* (1905) 16 M.L.J. 63: I.L.R. 29 Mad. 333 (F.B.), followed.

Appeal against the decree of the Court of the Subordinate Judge of Madura, dated 16th January, 1939, and passed in O.S. No. 10 of 1937.

T. M. Krishnaswami Aiyar for *P. S. Narayanaswami Aiyar* for Appellant.

T. L. Venkatarama Aiyar and *T. S. Vaidhyanatha Aiyar* for Respondents.

[This appeal coming on for hearing, the Court, (*Krishnaswami Ayyangar and Kunhi Raman, JJ.*) made the following]

ORDER OF REFERENCE TO THE FULL BENCH.

24th July, 1942.

The only question that arises for consideration in this appeal is whether the word "sister" in section 2 of the Hindu Law of Inheritance (Amendment) Act, II of 1929, includes a half sister as well. The appellant is the daughter of one Sundararaja Pillai, who died sometime in 1898, by his first wife Peria Meenal. Sundararaja Pillai married three more wives. By his second wife Pappathi Ammal he had two daughters, Mookammal and

*Appeal No. 141 of 1939. 13th November, 1942.

Chinna Ponnu both of whom are now dead. Mookammal's husband is the fourth respondent in this appeal. Chinna Ponnu has also left a son who is the third respondent. Meenammal, the first respondent, was the third wife of Sundararaja Pillai and is his only surviving widow. Her son was Muniandy Pillai, No. 24 in the pedigree attached to the plaint, He died in 1906, while yet a minor and his mother the first respondent succeeded to the estate as his heir. It is his estate which is the subject-matter of the present appeal. The fourth wife of Sundararaja Pillai left no issue.

The appellant instituted the suit out of which this appeal has arisen, namely, O.S. No. 10 of 1937 as well as two other suits on the file of the District Munsiff, Madura Town. These latter suits were transferred to the Court of the Subordinate Judge of Madura which had seizin of O.S. No. 10 of 1937 and re-numbered as O.S. Nos. 82 and 83 of 1937. In all these suits the appellant who was the plaintiff sought to obtain reliefs with reference to the estate of the last owner Muniandy in the hands of the first respondent and held by her as a limited owner under Hindu Law. The appellant's claim was based upon her being the next reversioner to the estate of Muniandy Pillai. But for the variation in the order of succession introduced by Act II of 1929 she as a half sister would be entitled to come in as a remote reversioner, the immediate reversioners being the agnates of the deceased who are respondents 5, 6 and 7 in the appeal. It was conceded that if the agnates are held to come in before her in the order of succession, the suits could not be maintained and the appeals would be liable to dismissal.

The Act under consideration is a brief one consisting, as it does, of three sections only of which section 3 has no bearing on the question under consideration. The Act is described as

> "an Act to alter the order in which certain heirs of a Hindu male dying intestate are entitled to succeed to his estate."

Then follows the preamble, namely,

> "Whereas it is expedient to alter the order in which certain heirs of a Hindu male dying intestate are entitled to succeed to his estate; It is hereby enacted as follows:"

Section 1, sub-section (1) designates the Act as the Hindu Law of Inheritance (Amendment) Act, 1929. Sub-section (2) after stating that the Act extends to the whole of British India, including British Baluchistan and the Sonthal Parganas, goes on to state that it is only applicable,

> "to persons who, but for the passing of this Act, would have been subject to the law of Mitakshara in respect of the provisions herein enacted, and it applies to such persons in respect only of the property of males not held in coparcenary and not disposed of by will."

It may be mentioned that these conditions are satisfied in the present case. Section 2, which introduces an alteration in the order of succession states as follows:

> "A son's daughter, daughter's daughter, sister and sister's son shall, in the order so specified, be entitled to rank in the order of succession next after a father's father and before a father's brother."

It will be seen that the above section contains no express mention of a half-sister though a sister is referred to and her rank fixed among the heirs. The question is whether the word "sister" should, as the appellant contends, be taken to include a half-sister as well. A Full Bench of the Allahabad High Court consisting of Sulaiman, C.J., Mukerji and King, JJ., considered the question in *Ram Adhar* v. *Sudesra*[1], and their decision was that the word "sister" in the section does not include a half-sister either consanguine or uterine. On an examination of the judgment the following reasons appear to have weighed with them:

(1) In plain English language 'sister' would not include a half-sister.

(2) The existence of an express provision in section 27 of the Indian Succession Act that there is no distinction between relations by the full blood and those by the half-blood and the absence of a similar provision in Act II of 1929.

(3) A sister should not be put in the same category as a half-sister as that would be against the rule of Hindu Law which excludes a relation of the half-blood in favour of the full-blood.

(4) If a sister includes a half-sister it will be difficult to make a distinction between a uterine sister and a consanguine sister and to let in both would be repugnant to the ordinary notions of Hindus who do not recognise a woman as a sister who has not the same father as the person himself.

(5) Lastly, the Act should be strictly construed.

This decision has been followed in *Kabootra, Musammat* v. *Ram Padarath*[2].

The identical question came up for the consideration of this Court in *Angamuthu Muthirian* v. *Sinnapennammal*[3]. The Court (Pandrang Row and Venkataramana Rao, JJ.) accepted as correct the opinion of the Full Bench of the Allahabad High Court and

---

1. (1933) I.L.R. 55 All. 725 (F.B.). 3. (1937) 47 L.W. 286.
2. (1935) I.L.R. 11 Luck. 148.

accordingly held that a sister would not include a half-sister. Two grounds in particular appear to have weighed with the Court in coming to this conclusion: (1) that the place assigned to the half-sister in the order of succession is "after the sister and not on a level with the sister", but this does not appear to be a conclusive reason in favour of the view taken, as there is nothing in the Act to displace the principle of the Hindu law in this respect, and nothing against the word 'sister' being understood in the wider sense; (2) before the Act a sister's son would exclude a sister as the former being a male *bandhu* is entitled to priority over females. It is difficult to see if a sister is assigned a higher rank than the sister's son, why a half-sister should not have the same priority in the absence of a legislative declaration to the contrary. A Bench of the Patna High Court (Fazl Ali and Chatterji, JJ.) has accepted the narrower interpretation of the word in *Mst. Daulat Kuer* v. *Bishundeo Singh*[1]. The learned Judges noticed the argument that the Hindu law of succession recognises no difference between relations of full-blood and those of half-blood except that among themselves precedence is given to the former over the latter, but negatived it on the ground that the half-sister, though an heir in Bombay and Madras only, came next after the sister and in other provinces neither of them were recognised as heirs. They observe,

> "While passing the Act, the Legislature must be presumed to have been aware of the well-recognised distinction existing under the Hindu law between a sister and a half-sister, and if it was their intention to include half-sister also within the new class of heirs she would have been specifically mentioned in section 2."

But it may be observed that there was equally good reason for the Legislature to have expressly excluded a half-sister.

On the other side of the line we have first a judgment of the Lahore High Court in *Rameshwar* v. *Mst. Ganpati Devi*[2], where the Court (Tekchand and Dalip Singh, JJ.) has expressed the opinion albeit *obiter*, that the opinion of the Full Bench of the Allahabad High Court has been expressed too broadly and the learned Judges entertained grave doubts as to the soundness of the decision and the reasons on which it was based. The Nagpur High Court has on two occasions considered the meaning and import of the word "sister" in the Act. In *Shanker* v. *Raghoba*[3], the Court (Stone, C.J., and Vivian Bose, J.) understood the words "sister's son" in the Act as including the half-sister's son as well. They expressed the opinion that,

> "The word 'sister' is a generic term which would include not only a sister of the full-blood or sister german, as she is sometimes called, but also a sister of the half-blood."

The question was more elaborately examined by a Full Bench of the same Court (Stone, C.J., Pollock and Vivian Bose, JJ.) in *Amrut* v. *Mst. Thagan*[4], and the view taken in the Bench decision was affirmed. It was pointed out that,

> "A daughter by one wife and a daughter by another wife are, vis-a-vis the father exactly on a parity, and, though one is postponed to the other on the principle that the whole-blood is preferred to the half-blood each is equally near to a brother by the same father."

In other words "a sister succeeds as the father's daughter and a half-sister having the same father is therefore an heir if the sister would be an heir". This approach to the question is certainly supported by the principles underlying the law of succession among the Hindus, but it was not noticed in the cases that support the opposite view. There is to our mind great force in the observation, that

> "It is contrary to the underlying ideas of the Mitakshara and of the society whose laws were there expressed, to attach any particular importance, legally, to the fact that one daughter was born of one wife and another of another."

In *Raghuraj Chandra* v. *Subhadra Kunwar*[5], where the Privy Council had to consider the effect of a statute not dissimilar in its provisions in so far as it introduced alterations in the general rules of Hindu law applicable to Oudh Talukdars, their Lordships observed that the Oudh Acts,

> "are not designed to force one arbitrary and unnatural line of succession on all taluqdars regardless of their family law, but are meant to be adapted to the circumstances of different classes of taluqdars, except where an express deviation is made from the rules ordinarily applicable."

The following further observations appear to us to have a material bearing on the question under consideration:

> "Hindu law, it is true, is in not a few instances deliberately departed from, but there could be no rational object in devising a mongrel rule of succession and construing it exclusively in the sense of the English terms used in expressing it. The section must be read, so far as its language permits so as to be rational

1. (1940) I.L.R. 19 Pat. 382.
2. (1936) I.L.R. 18 Lah. 525.
3. A.I.R. 1938 Nag. 97.
4. I.L.R. 1938 Nag. 115 (F.B.).
5. (1928) 55 M. L. J. 778: L. R. 55 I.A. 139 (P.C.).

and orderly, not so as to be arbitrary and capricious. The appellant's interpretation would make the provision cut across the recognised principles of Hindu law on the subject without approximating to the law of any other community. . . . . . ."

The passages extracted above appear to lend strong support to the reasoning which prevailed with the Full Bench of the Nagpur High Court. We consider that the matter merits further consideration by a Full Bench of this Court in the light of the reasons adduced by the Nagpur High Court. We accordingly frame the following question for decision by a Full Bench:

"Whether the word 'sister' in the Hindu Law of Inheritance (Amendment) Act, II of 1929 includes a half-sister?"

The papers will be placed before the Honourable the Chief Justice for orders.

[This appeal again coming on for hearing, the Court, (*Krishnaswami Ayyangar and Kunhi Raman, JJ.* made the following]

ORDER.

27th July, 1942.

In the referring order pronounced by us on 24th July, 1942, we had not dealt with a preliminary objection taken by the respondents as to the maintainability of the appeal. The fact is that after hearing the preliminary objection argued on the former occasion we were inclined to the view that there was no substance in it. As the matter was once again pressed before us we propose to deal with it now.

We have already mentioned that the present appeal was filed against the decree in O.S. No. 10 of 1937, which was one of three suits all tried together and disposed of by the same judgment. The substantial relief asked for in O.S. No. 10 of 1937 is for the appointment of a receiver to take possession of the estate of the late Muniandy on the ground of waste and malversation alleged to have been committed by the first respondent. In the two other suits namely, O.S. Nos. 82 of 1937 and 83 of 1937, the reliefs asked for were substantially for certain alienations made by the first respondent being set aside. Although the reliefs asked for are thus different, the common objection raised in all the suits is that covered by Issue 1 in O.S. No. 10 of 1937, namely,

"Is the plaintiff, the admitted half-sister of Muniandy Pillai, the last male owner, entitled to his estate under Act, II of 1929 in preference to the admitted agnates, defendants 5 to 7? If not, is the suit based solely on plaintiff being the next immediate reversioner to his estate sustainable?"

As we have said, all the three suits were tried together and disposed of by a common judgment. The only issue which has been determined by the Court below so far, is the first issue set out above raising the question of the heirship of the appellant. As the learned Subordinate Judge has arrived at a finding adverse to the claim of the appellant on this issue he did not consider it necessary to deal with the other issues relating to the merits of the claim. In fact this issue was tried as a preliminary issue, no evidence having been adduced in regard to the other issues in the other suits.

As a result of his judgment all the three suits were dismissed and separate decrees were passed in each of them. The present appeal A.S. No. 141 of 1939 was preferred directly to this Court from the decision of the Subordinate Judge. From the decrees in O.S. Nos. 82 and 83 of 1937, there were two appeals, namely, A.S. Nos. 78 and 97 of 1939, preferred to the District Court, Madura, by the appellant here. But in view of the pendency of A.S. No. 141 of 1939, these appeals were withdrawn to this Court and were numbered as Nos. 279 and 280 of 1940 respectively. It was found that the appellant had not paid sufficient court-fee on these appeals and as he failed to make up the deficiency these appeals were ultimately rejected on 16th March, 1942.

The preliminary objection raised on behalf of the respondents is, that inasmuch as the decrees passed in O.S. Nos. 82 and 83 of 1937 have become final as a result of the appeals therefrom having been rejected, it is not open to the appellant to maintain A.S. No. 141 of 1939. The argument is that the appellant's right to maintain the suit as the nearest reversioner to Muniandy has been negatived by the finding arrived in these suits and the decision operates as *res judicata* and precludes us from considering the same question here. In *Panchanada Velan* v. *Vaithinatha Sastrial*[1], a Full Bench of this Court had to consider the effect of a decree, from which no appeal had been preferred, passed in a suit which was tried along with another suit from which an appeal had been filed. The dispute was between a landlord and his tenant and the substantial question at issue in both the suits was the same, namely, what should be the terms of the patta to be exchanged between the parties? The tenant's suit was to compel the landlord to grant a patta containing terms which according to the tenant should be held to be correct terms. The landlord's suit was one for compelling the tenant to accept a patta with different terms. Both the suits were tried together and a judgment was delivered on the same day. The tenant's suit was dismissed, the landlord's decreed, the terms of the patta accepted by the Court being those set up by

1. (1905) 16 M.L.J. 63: I.L.R. 29 Mad. 333 (F.B.).

the landlord. The tenant preferred an appeal against the decree made in the suit instituted by him and preferred no separate appeal against the decree in the landlord's suit. Objection being taken that the tenant's suit was barred by *res judicata* by reason of the decree in the landlord's suit not appealed against, the Court was called upon to decide the question. In overruling the objection, the Full Bench clearly indicate the principle to be applied in such cases, where the object of the appeal is in substance, if not in form, to get rid of the very adjudication which is put forward as constituting *res judicata,* that adjudication should not be held to bar the appeal. It is necessary to add the qualification that the decision must have been rendered at the same time and the suits must have been tried together. It is true that in the judgment under consideration there were cross suits but so far as we are able to judge, this circumstance appears to be immaterial. We consider that the pith of the judgment is contained in this sentence,

> "It would lead to startling results if we were to hold that an Appellate Tribunal is precluded from dealing with a question which comes before it on appeal because an inferior Court, upon the same facts but in a case other than the case under appeal had, given a decision which had not been appealed against, *at the same time as the decision in the case under appeal.*"

The italics are ours. *Ramaswami Chetti* v. *Karuppan Chetti*[1], is a decision by Wallis, C.J., and Srinivasa Aiyangar, J. In this case the same plaintiff had instituted two suits. The contesting defendant was an agent in a firm of which the plaintiff and another person were partners. He had a one-sixth share given to him in the profits and losses of that firm, but instead of giving that share in the same firm, a subsidiary firm was started which was to be entitled to an one-third share in the profits and losses of the main firm and in this subsidiary firm, the agent was to receive his share which was to be half, which was equivalent to an one-sixth share in the main firm. There were two suits filed, the first in respect of the main firm and the second in respect of the subsidiary, and in both the plaintiff prayed for accounts being taken and the rights of the parties ascertained. It will thus be seen that the parties were identical, and the subject-matter of the two suits was also identical; and the necessity for the institution of the two suits was due to there having been two firms as mentioned above. Decrees having been passed in both the suits which were tried together, the plaintiff filed an appeal in the main suit and omitted to appeal against the decree in the subsidiary suit. The question was whether that appeal was not maintainable. Following the decision in *Panchanada Velan* v. *Vaithinatha Sastrial*[2], the Court overruled the plea of *res judicata* raised by the respondent. This decision is important in that it shows that the Full Bench decision is not to be confined to cross suits only but that it is equally applicable to suits between the same parties in which a common question is raised and decided and an appeal is preferred in only one of the suits. The first paragraph of the head-note expresses the decision of the Court correctly,

> "Where the matter in issue in two suits was the same and the suits were tried together on the same evidence and disposed of by the same Judge, and the judgment in the one case was based on and followed the judgment in the other, though separate decrees were drawn up, an appeal against one of these decrees is not barred by *res judicata* by reason of the fact that no appeal was filed against the other decrees."

The cases reported in *Lakshmi Ammal* v. *The Official Receiver, Tinnevelly*[3], and *Narayanaswami Aiyar* v. *Sevadappa Gounder*[4], proceed upon similar facts. There was a suit by a mortgagee to enforce a mortgage executed by a person who was subsequently adjudged an insolvent. The Official Receiver, the defendant in the suit, questioned the mortgage by an independent application under section 53 of the Provincial Insolvency Act. Both the proceedings were tried together, the Court passing a decree in favour of the mortgagee and dismissing the application of the receiver. The receiver filed an appeal only against the order dismissing his application without appealing against the decree in the mortgage suit. The question considered was whether the appeal was maintainable. Beasley, C.J., who decided the earlier case referred to the sentence in the Full Bench judgment extracted above and held that the doctrine of *res judicata* had no application when the very object of the appeal was to get rid of the decision pleaded in bar. In the latter case which is a decision of my Lord the Chief Justice and Happell, J., the judgment of Beasley, C.J. was followed.

The latest case in our Court is that reported in *Chockalinga Thevar* v. *Sankarappa Naicker*[5]. The facts were materially different from those which appear in the present case and in the cases to which we have so far referred. The head-note makes this clear:

> "Where during the pendency of an appeal against the finding in a suit, the same issue had been raised and decided differently in another suit in the same Court later by a different Judge and such later decision had been allowed to become final it will operate as *res judicata* in the appeal against the earlier decision."

---

1. (1915) 29 M.L.J. 551.
2. (1905) 16 M. L. J. 63: I. L. R. 29 Mad. 333.
3. (1934) 67 M.L.J. 364.
4. (1941) 2 M.L.J. 932.
5. (1942) 1 M.L.J. 281.

Here there were different decisions in different suits tried on different occasions by different Judges. The decision in *Panchanada Velan* v. *Vaithinatha Sastrial*[1] was cited but distinguished on the ground that the Full Bench only held that the doctrine of *res judicata* had no application when the object of the appeal in substance, if not in form, was to get rid of the decision which was pleaded in bar.

These decisions of our Court leave no room for doubt as to what our answer should be to the objection raised. We are of opinion that our decision is really governed by the principle of the Full Bench decision in *Panchanada Velan* v. *Vaithinatha Sastrial*[1]. Before concluding we may refer to the statement of law contained in Mulla's Commentaries on the Code of Civil Procedure at page 38 of the 11th edition, where he deals with the point under consideration. The learned author says,

> "The preponderance of judicial decisions in different High Courts is in favour of the view that the judgment not appealed against does not become *res judicata*. This is on the ground that a decision given simultaneously cannot be said to be a decision in a suit."

The preliminary objection must accordingly be overruled. The reference to the Full Bench will now go forward.

This appeal coming on for hearing, before the Full Bench:

T. M. Krishnaswami Aiyar for *P. S. Narayanaswami Aiyar* for Appellant.

T. L. Venkatarama Aiyar and *T. S. Vaithinatha Aiyar* for Respondents.

The Court expressed the following

OPINION†.—The question which has been referred is whether the word "sister" in the Hindu Law of Inheritance (Amendment) Act, 1929, includes a half-sister. That Act was passed because the Legislature deemed it to be expedient to alter the order in which certain heirs of a Hindu male dying intestate are entitled to succeed to his estate. Section 2 says that a son's daughter, daughter's daughter, sister, and sister's son shall, in the order so specified, be entitled to rank in the order of succession, next after a father's father and before a father's brother. There is a conflict of opinion on the question whether the word "sister" includes a half-sister. The Allahabad High Court in *Ram Adhar* v. *Sudesra*[2], has held that the word "sister" does not include a half-sister, and this decision has been followed by this Court in *Angamuthu Muthirian* v. *Sinnapennammal*[3], and by the Patna High Court in *Mst. Daulat Kuer* v. *Bishundeo Singh*[4]. On the other hand the Nagpur High Court has held that it does. The Nagpur case is *Amrut* v. *Mst. Thagan*[5], in which an earlier unreported case of the same Court was followed. The learned Judges who have made this reference have carefully examined all the cases in which this question has been discussed and as we are in agreement with their observations, it is not necessary to travel over all the ground again. We will state the reasons given for the two opinions and our own reasons for agreeing with the Nagpur opinion, which we consider to be the correct one.

The reasons given by the Allahabad High Court for holding that the word "sister" does not include a half-sister are that in the English language the word ordinarily means a sister of the full blood; that while section 27 of the Indian Succession Act states that for the purpose of succession under that Act there is no distinction between those who are related to a person by the full-blood and those who are related to him by the half-blood, section 23 says that this provision shall not apply to Hindus; that according to the spirit of the Hindu law, as interpreted in those parts of the country where the Mitakshara law prevails, a relation of the full-blood excludes a relation of the half-blood and that if the word "sister" were held to include a half-sister, it would mean putting the half-sister in the same category; that if a sister includes a half-sister there can be no reason to make a distinction between a uterine sister and a consanguine sister; and that the Act should be construed strictly. Stated broadly, the opinion of the Nagpur

† 13th November, 1942.
1. (1905) 16 M. L. J. 63: I. L. R. 29 Mad. 333.
2. (1933) I.L.R. 55 All. 725 (F.B.).
3. (1937) 47 L.W. 286.
4. I.L.R. 19 Pat. 382.
5. I.L.R. 1938 Nag. 115 (F.B.).

High Court is that the word "sister" is a generic term which would include not only a sister of the full-blood, but also a sister of the half-blood, and that it is contrary to the underlying ideas of the Mitakshara and of the society whose laws were there expressed to attach importance to the fact that one daughter was born of one wife and another of another.

The Court is here called upon to interpret an Indian statute relating to the Hindu Law of Inheritance and therefore it must have regard to the Hindu conception of the word "sister", and not to the ordinary meaning which it has in England. The Hindu law makes no distinction between sons of the same father by different wives so far as ancestral property and the self-acquired property of the father are concerned. All his sons have the same rights in the ancestral property and share equally in the father's self-acquired property should he die intestate. To the Hindu mind there is no distinction between daughters born of the same father by different wives, and like sons of the same father by different wives, daughters by different wives, rank equally so far as the father's property is concerned.

As we have pointed out one of the reasons given by the Allahabad High Court for its decision is the statement that the whole blood is preferred to the half-blood under Hindu law and that if the word "sister" were held to include a half-sister it would mean putting the half-sister in the same category. The whole-blood is preferred in the case of "sapindas of the same degree of descent from the common ancestor". The preference does not apply to persons of different degrees. This was pointed out by the Privy Council in *Ganga Sahai* v. *Kesri*[1], where an uncle of the half-blood was preferred to the sons of an uncle of the full-blood, and in *Garuddas* v. *Laldas*[2], the Judicial Committee drew attention to placita 5 and 6 of the fourth section in the second chapter of the Mitakshara which embody this principle. We are in agreement with the statement in Mayne (10th edition, 670) that the suggested difficulty of the half-sister and the sister taking together under the Mitakshara vanishes if the Act is read in the light of Hindu law, according to which a full sister will exclude a half-sister and only in default of a full-sister will the half-sister succeed. To read the word "sister" in the Hindu Law of Inheritance (Amendment) Act, as including the half-sister means that the half-sister will share equally with the full sister in the property left by the father, but she will come after the full-sister when the succession is to the property of any other relation. This reading accords in full with Hindu ideas and principles of Hindu law, and in our opinion is the correct reading.

It follows that we are unable to accept the statement that if a sister is held to include a half-sister there will be no reason to make a distinction between a uterine sister and a consanguine sister. In fact, the judgment of the Allahabad High Court itself provides the reason for the rejection of this argument. It is there pointed out that among Hindus a woman on becoming a widow does not re-marry, except under the enabling Act of 1856, which is rarely invoked and that ordinarily it would be repugnant to the notions of Hindus to recognise a woman as a sister who has not got the same father. It certainly would be repugnant to Hindu ideas to put the daughter of a widow by her second husband on the same footing as her daughter by her first husband and it would be manifestly wrong to interpret the Hindu Law of Inheritance (Amendment) Act, in a sense repugnant to Hindu ideas.

The argument based on sections 23 and 27 of the Indian Succession Act is, with great respect, equally lacking in force. These sections appear in Part IV of the Indian Succession Act. Section 23 says that nothing in that part of the Act shall apply to intestate or testamentary succession to the property of any Hindu, Mohammadan, Buddhist, Sikh, Jaina or Parsi. These communities were excluded from the operation of that part of the Act, because they possess their own personal laws. The

---

6. (1915) 29 M.L.J. 329: 42 I.A. 177: 37 All. 545 (P.C.).

7. (1933) 64 M.L.J. 660: L.R. 60 I.A. 189 (P.C.).

exclusion section certainly cannot be called in aid in deciding what those personal laws are, and therefore cannot help in the interpretation of the Hindu Law of Inheritance (Amendment) Act.

We agree that the Act under discussion must be construed strictly, but it must be construed strictly in accordance with Hindu conceptions and when this is done, we have no hesitation in holding that the word "sister" in the Hindu Law of Inheritance (Amendment) Act, 1929, includes a half-sister by the same father. It may be added that this opinion is strongly held by the learned editors of both Mayne (10th edition 669) and Mulla (Preface to the 9th edition).

For the reasons stated the question will be answered in the affirmative, which means that the decision of this Court in *Angamuthu Muthirian* v. *Sinnapennammal*[1], will be overruled.

The costs of the reference will be made costs in the appeal.

K.S. — *Reference answered.*

[SPECIAL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice,* MR. JUSTICE LAKSHMANA RAO AND MR. JUSTICE KRISHNASWAMI AYYANGAR.

In the matter of a Pleader, Ottappalam.

Legal Practitioners' Act (XVIII of 1879), section 13 (f)—Duty of practitioner—Demonstration in Court by him punishable under Defence of India Rules—Interference with administration of justice—Liability to be dealt with under the Act.

It is the duty of a legal practitioner to assist the Court. If he appears in Court and makes a demonstration which has the effect of interfering with the work of the Court and the administration of justice he does something which a member of the legal profession certainly ought not to do. Such conduct will amount to "reasonable cause" under section 13 (*f*) of the Legal Practitioners' Act for action being taken against him.

The Advocate-General for the Crown.

Pleader not represented.

The Judgment of the Court was delivered by

The Chief Justice.—The respondent is a pleader practising at Ottappalam. On the 21st August, 1942, he was convicted under rule 34 (6) (*c*) read with rule 38 (5) of the Defence of India Rules by the Joint Magistrate of Malappuram, and sentenced to undergo rigorous imprisonment for one month. The evidence in that case showed that he had interrupted the work of the Subordinate Judge's Court, Ottappalam, by shouting Congress slogans and exhorting the Subordinate Judge to resign his position as a protest against the arrest of the Congress leaders. As the result of the respondent's disorderly conduct the Subordinate Judge was forced to retire to his room. The respondent was then ejected from the Court. The respondent afterwards went to the Court of the District Munsiff and made a similar demonstration. In consequence he has been called upon to show cause why he should not be dealt with under section 13 (*f*) of the Legal Practitioners' Act. The respondent has not appeared but has written a letter to the Registrar of the Court in which he says that there is no case for action against him under the Legal Practitioners' Act.

In effect he admits his misconduct in the two Courts referred to but attempts to excuse himself on the ground that his action was prompted by what he describes as "the legitimate object of securing the country's freedom". No charge has been framed against him under section 12 of the Legal Practitioners' Act and therefore it is not necessary to consider whether that section can be invoked in such a case as this. It is manifest, however, that the respondent has been guilty of improper conduct as a legal practitioner. It is the duty of a legal practitioner to assist the Court. If he appears in Court and makes a demonstration which

1. (1937) 47 L.W. 286.

*Referred Case No. 27 of 1942. 23rd November, 1942.

has the effect of interfering with the work of the Court and the administration of justice he does something which a member of the legal profession certainly ought not to do. The Court has power under section 13 (*f*) to suspend or dismiss a legal practitioner for any reasonable cause. We consider that reasonable cause has been shown here for the taking of action against the respondent. He has suffered a term of imprisonment but that does not mean that he should not be dealt with under the Act. His conduct has been such that we direct that his sanad be suspended for a period of twelve months.

K.C. ——— *Sanad suspended for twelve months.*

[FULL BENCH].

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE LAKSHMANA RAO, AND MR. JUSTICE SOMAYYA.

T. Sankara Menon and others .. *Appellants** (*Defts.*)

v.

T. V. Sundara Aiyar .. *Respondent* (*Petr.*).

Limitation Act (*IX of* 1908), *Art.* 182 (5)—*Application for delivery of property sold in auction by mortgagee—Certain items sold first—Application for remaining items being sold—Whether lapse of more than three years bar to the application—Whether application previously filed in respect of other items could be relied on.*

The Madras High Court has consistently regarded an application for possession of property or money realised by a plaintiff decree-holder in execution as being a step-in-aid of execution, and this opinion is shared by other High Courts in India. In *Thangishettithi* v. *Duja Shetti*[1], it has been stated that the view already taken by this High Court must be adhered to and the maxim *stare decisis et non quieta movere* is applicable to the situation.

A mortgagee brought to sale some items of the mortgaged property and purchased them and got delivery of possession. Later, when he applied for the sale of the remaining items after three years from the date of the decree it was contended that his applications for delivery of possession in respect of the previously sold items could not be relied upon as saving limitation.

Held, that the mortgagee's application was not barred as he could rely upon the applications for delivery of possession in respect of previously sold items as steps-in-aid of execution.

Lakshmanan Chettiar v. *Kannammal*, I.L.R. 24 Mad. 185 and *Kannan* v. *Avvulla Haji*, (1926) 52 M.L.J. 1: I.L.R. 50 Mad. 403, relied on.

Appeal against the order of the Court of the Subordinate Judge of South Malabar at Calicut, dated 10th November, 1941 and made in E. P. No. 402 of 1941 in O. S. No. 32 of 1935.

C. K. Viswanatha Aiyar for Appellants.

P. Govinda Menon for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—The questions in this appeal relate to the law of limitation. On the 7th December, 1936, the respondent obtained a mortgage-decree against the appellants in the Court of the Subordinate Judge of South Malabar. On the 19th March, 1937, the decree-holder applied for the sale of one of the several properties covered by the decree. This item was sold on the 6th September, 1937, and on the 4th March, 1938, the sale was confirmed and partial satisfaction entered up. On the 6th October, 1939, the decree-holder applied for delivery of possession of the property sold. The appellants asked the decree-holder to give them time and he consented to do so. Consequently on the 16th November, 1939, this application was dismissed. On the 30th September, 1940, the decree-holder filed a second application for an order directing delivery of possession of the property which he had purchased, and on the 27th November,

---

*A.A.O. No. 156 of 1942. 27th October, 1942.

the parties reported to the Court that possession had been given. On the 28th August, 1941, the decree-holder filed the application which has given rise to this appeal. He applied for the sale of the remaining items of property covered by his decree. It was contended by the appellants that the application was barred by the law of limitation. They said that the decree-holder could not rely on his applications for delivery of possession which he had filed on the 6th October, 1939, and on the 30th September, 1940. The Subordinate Judge rejected their contention, relying on the decisions of this Court in *Lakshmanan Chettiar* v. *Kannammal*[1], and *Kannan* v. *Avvula Haji*[2].

The judgment-debtors appealed to this Court and in the first instance the appeal came before Krishnaswami Ayyangar and Kunhi Raman, JJ. As they were of the opinion that the decisions of this Court in *Sultan Sahib Marakayar* v. *Chidambaram Chettiar*[3], *Ramaswami Aiyar* v. *Abdul Aziz Sahib*[4], and *Nandur Subbayya* v. *Raja Venkataramayya Apparao*[5], were in conflict with the decisions relied upon by the Subordinate Judge, they referred the appeal to a Full Bench for decision.

The judgments in *Sultan Sahib Marakayar* v. *Chidambaram Chettiar*[3], *Ramaswami Aiyar* v. *Abdul Aziz Sahib*[4], and *Nandur Subbayya* v. *Raja Venkataramayya Apparao*[5], are not in fact really in conflict with *Lakshmanan Chettiar* v. *Kannammal*[1] or *Kannan* v. *Avvula Haji*[2]. In each of the cases relied upon by the Subordinate Judge the question was whether the application could be deemed to be a step-in-aid of execution. The decisions referred to by Krishnaswami Ayyangar and Kunhi Raman, JJ., relate to applications for execution. The present case does not fall within those decisions. In the Full Bench case of *Abdul Aziz Sahib* v. *Chokkan Chettiar*[6], this Court held that an application for delivery could not be regarded as an application for execution and so far as we are concerned the decision must be regarded as final. The question whether the applications on which the decree-holder relies in this case amount to steps-in-aid of execution, however, remains.

There is a long line of decisions of this Court which says that an application by a decree-holder for the payment out to him of money lying in Court and obtained in execution of his decree is a step-in-aid of its execution. The earliest case is *Venkatarayalu* v. *Narasimha*[7], which was decided 62 years ago. This decision was followed in *Kerala Varma Valia Raja* v. *Shangaram*[8], *Koormayya* v. *Krishnamma Naidu*[9], *Thangishettithi* v. *Duja Shetti*[10] *Sabapathi Chetti* v. *Shanmugham Chetti*[11], and *Balaguruswami Naicken* v. *Guruswami Naicken*[12]. There can be no difference in principle when the application is for payment out of Court of money realised in execution and when it is an application for possession of property sold in execution by the decree-holder purchaser. This was pointed out by the Allahabad High Court in *Motilal* v. *Makund Singh*[13]. The judgment there was approved by this Court in *Lakshmanan Chettiar* v. *Kannammal*[1], where two earlier Calcutta decisions which ran contrary were also discussed.

The principle laid down by this Court in *Venkatarayalu* v. *Narasimha*[7], was in effect applied by it in *Lakshmanan Chettiar* v. *Kannammal*[1], *Kasinatha Aiyar* v. *Uthumunnesa Rowther*[14], and *Kannan* v. *Avvula Haji*[2], where the applications referred to possession of immovable property sold in execution and bought by the decree-holder and the opinion of this Court is now shared by the High Courts of Calcutta, Bombay and Allahabad. The earlier Calcutta cases which were in

1. (1900) I.L.R. 24 Mad. 185.
2. (1926) 52 M.L.J. 1: 50 Mad. 403.
3. (1908) 19 M.L.J. 224: 32 Mad. 136.
4. (1916) 3 L.W. 191.
5. (1917) 7 L.W. 16.
6. (1935) 69 M.L.J. 821: 58 Mad. 893 (F.B.).
7. (1880) I.L.R. 2 Mad. 174.
8. (1892) I.L.R. 16 Mad. 452.
9. (1893) 3 M.L.J. 296: 17 Mad. 165.
10. (1918) 35 M.L.J. 575.
11. (1923) 46 M.L.J. 453.
12. (1924) 48 M.L.J. 506.
13. (1897) I.L.R. 19 All. 477.
14. (1901) 12 M.L.J. 1: 25 Mad. 529.

conflict are *Hem Chunder Chowdhury* v. *Brojo Soondhury Debee*[1], and *Fuzloor, Rahman* v. *Altaf Hussain*[2]. In *Sariatoolla Molle* v. *Raj Kumar Roy*[3], the Calcutta High Court, however, expressly approved of the judgment in *Motilal* v. *Mukund Singh*[4], and a Full Bench of the Calcutta High Court approved of the judgment in *Sariatoolla Molle* v. *Raj Kumar Roy*[3], in *Kailash Chander Tarapodar* v. *Gopal Chandra Poddar*[5]. In *Babu Chand* v. *Mugnit Rao*[6], the Bombay High Court expressed agreement with the opinion held by this High Court and the Allahabad High Court and re-affirmed its agreement in *Sadasiva Bin Mahadu* v. *Narayan Vithal*[7]. The Allahabad High Court endorsed its earlier decision in *Latafat Ali Khan* v. *Kalyanmal*[8].

Therefore the position is this. This Court has consistently regarded an application for possession of property or money realised by a plaintiff decree-holder in execution as being a step-in-aid of execution and that opinion is shared by other High Courts in India. When the present question was raised in *Thangishettithi* v. *Duja Shetti*[9], this Court said that it must adhere to the view which it had already taken, and there is all the more reason why we should adhere to it now when further decisions have been given to the same effect. It is difficult to imagine a more suitable situation for the application of the maxim *stare decisis et non quieta movere.*

The appeal will be dismissed with costs.

K.C. *Appeal dismissed.*

[PRIVY COUNCIL.]

PRESENT:—LORD THANKERTON, SIR GEORGE RANKIN AND SIR MADHAVAN NAIR.

Lala Hem Chand .. *Appellant**

v.

Lala Pearey Lal and others .. *Respondents.*

Adverse possession—Invalid dedication to charity in a will—Executor holding property for over 12 years on behalf of charity—Possession adverse to true owner whose title will be extinguished under section 28 of the Limitation Act—Section 10, Limitation Act not applicable.

Where the provision in a will creating a charitable trust is inoperative in law, section 10, Limitation Act is inapplicable to the case and the property is held by the executor adversely to the heir-at-law, the true owner and if he so holds it for the statutory period on behalf of the charity for which it was dedicated the title acquired by prescription vests in the charity and the title of the heirs of the testator becomes extinguished by the operation of section 28 of the Limitation Act.

A.I.R. 1938 Lah. 539, affirmed.

On appeal from a decree of the High Court of Judicature at Lahore (Addison and Din Mohammad, JJ.), dated the 27th January, 1938, reversing a decree of the Senior Sub-Judge, Delhi, dated the 30th November, 1936.

C. S. Rewcastle and *S. Hyam* for Appellant.

J. M. Parikh for Respondents.

Their Lordships' Judgment was delivered by

SIR MADHAVAN NAIR.—This is an appeal from a decree of the High Court of Judicature at Lahore, dated 27th January, 1938, which reversed a decree of the Court of the Subordinate Judge of Delhi, dated 30th November, 1936, in favour of the defendant—the appellant before the Board. The appeal arises out of a suit instituted by the plaintiffs, on behalf of the members of the brotherhood

1. (1881) I.L.R. 8 Cal. 89.
2. (1884) I.L.R. 10 Cal. 541.
3. (1899) I.L.R. 27 Cal. 709.
4. (1897) I.L.R. 19 All. 477.
5. (1926) I.L.R. 53 Cal. 781 (F.B.).
6. (1896) I.L.R. 22 Bom. 340.
7. (1911) I.L.R. 35 Bom. 452.
8. I.L.R. 1938 All. 342.
9. (1918) 35 M.L.J. 575.

*P.C.A. No. 87 of 1939. 29th June, 1942.

of the Digambar Jains, for recovery of possession from the defendant of a house described as "Jain Dharmasala," situate at Khatra Mashru in ward 4 of the town of Delhi, and entered as No. 48 in the municipal registers. The question for decision in this appeal is whether the plaintiffs have established their title to, and right to recover possession of, the suit property from the defendant. The parties to the suit are Jains, and are governed by the Mitakshara law. In the plaint, it was alleged that the house in dispute was purchased by one Lala Janaki Das, presumably with his own funds, that he "converted it" into a Dharmasala, that it was used as such and managed by him during his lifetime, that after his death in 1909 it remained under the management of his son, Ramchand, plaintiff 3, till it was handed over to the Jain Orphanage Society of Delhi, that the defendant got possession of it from him in January, 1931, for temporary use during the occasion of the marriage of his daughter, and that he refused to vacate when he was asked to return it. The defendant traversed the allegations of the plaint, repudiated the dedication of the property as "Dharmasala," and pleaded as material facts that the house was owned and possessed "by him." He also questioned the right of the plaintiffs to maintain the suit.

In the course of evidence, the following facts were elicited: one, Sri Ram, "by occupation a pleader, resident of Delhi," executed a will on 23rd March, 1892. After appointing two executors, Lala Janaki Das (mentioned in the plaint) and Munshi Ramji Das, and setting out the details of his movable and immovable properties, valued at Rs. 40,400 the testator expressed in para. 1 of the will his intention of creating a trust for charity in respect of Rs. 11,500 out of his properties as follows:

"1. Out of the aforesaid property of the value of Rs. 40,400, property worth Rs. 11,500 . . . . . *viz.*, one house situate in Khatramashru and valued at Rs. 6,500 . . . . . and Rs. 5,000 . . . . . in cash be given away in charity. That is, the money be given away in charity account and the house under reference be made wakf. I myself will manage the wakf house in my lifetime, and after my death managers shall be appointed and instructions shall be laid down for their guidance."

In paras. 2 and 3 of the will the testator made provisions in favour of his wife, Mt. Durgi Devi, and Mt. Bhugli, widow of his deceased son. In para. 4, after giving a legacy to a cousin of his, he left the residue for charity in the following terms:

"As regards the remaining property of the value of about Rs. 12,000 (twelve thousand), I make the following will: The property which is left unbequeathed at the time of my death be included in the charity account."

It may be mentioned that the testator did not carry out his intention of creating a charitable trust. About a week before his death, by a codicil, dated 30th April, 1892, he amended the disposition for charity of the residue made in para. 4 of the will as follows:

". . . . . I now . . . . . amend the said wording of para. 4 of the will . . . . . and make the following will about the use of the unbequeathed sum of about Rs. 12,000: The said amount of money . . . . . . To be deposited in the charity account, on account of the Land situate at Pahar Gang . . . . . Rs. 7,000 (Rupees 7,000)."

He applied the balance of the residue to legacies to certain specified persons and for the construction of an inner hall in a named temple in the name of his deceased son. On 7th May, 1892, the testator died leaving surviving him his widow Mt. Durgi, and Mt. Bhugli, the widow of his predeceased son Peari Lal, who died on 21st February, 1892. On 19th November the executor Lala Janaki Das obtained probate of the wills. In 1894, while Mt. Durgi, the widow of Sri Ram, was still living Mt. Bhugli, the widow of Peari Lal, adopted Hemchand, the defendant, who was then said to be seven or eight years old. The factum of adoption was at first disputed by the respondents, but it is admitted before the Board. Its validity, however, has been questioned throughout. On 3rd April, 1907, Janaki Das purchased from one Badri Das, the house in suit. The sale-deed states that ". . . the vendee has purchased the property with the money left by Babu Sri Ram Vakil deceased for purposes of building a Dharmasala. . ." It is common

ground that the property was purchased by Lala Janaki Das out of the estate left by Babu Sri Ram. The defendant was present when the document was registered. After purchase, the house was completely renovated in 1908. The defendant stated that "he looked to the building of the house." It bears on one of its walls the inscription "Dharmasala Babu Sri Ram Vakil Jaini 1909" written in Urdu and Hindi. This was known to the defendant. Lala Janaki Das died in 1909.

It will be observed that important facts forming the basis of the case as presented to the lower Courts for decision, *viz.*, that Lala Janaki Das purchased the suit property from the funds of the estate of Babu Sri Ram of which he was an executor under his will, that the defendant claimed that he was adopted by the widow of Peari Lal—a claim disputed by the plaintiffs but important to the defendant, as he based his title to the property on it—were disclosed with connected facts only in the course of evidence, and had not been mentioned in the pleadings by either party; nor had any issues been raised regarding them. Their Lordships desire to observe that, though the case has been decided on all the points which arose on the evidence led by the parties, the procedure adopted by the trial Court of allowing the parties to adduce evidence on points not raised in the pleadings or issues was irregular and should not have been allowed without amending the pleadings and raising the necessary issues.

The plaintiffs contended that the suit property was dedicated as a "Dharmasala" by Janaki Das, that the title to it belonged to the Digambar Jain Brotherhood, that the defendant's adoption by Mt. Bhugli at the time when the property vested in Mt. Durgi was invalid, that he came into possession as the house was lent to him in 1931 for temporary use on the occasion of his daughter's marriage, and that he was thus liable to ejectment. They also urged that Lala Hemchand (*i.e.*, the defendant), having himself accepted and joined in the trust and allowed construction of the house in dispute out of the sale proceeds of the property at Paharganj, is estopped from denying its validity.

On behalf of the defendant, it was contended that the provisions of the will relating to the creation of the charity are vague, and therefore inoperative in law, that the money should be treated as undisposed of and held by the trustee on behalf of the author of the trust or his legal representatives, that as the will was void with regard to the gift to charity, the user of the property in dispute as a "Dharmasala" was immaterial, that his adoption was valid under the Hindu law, and that he is therefore entitled to the property as Babu Ram's legal heir. It was also contended that the defendant was all along in possession of the property and that he was not estopped from contesting the present suit.

The Subordinate Judge accepted the contentions of the defendant, and dismissed the plaintiffs' suit, holding that the defendant is in "possession" and cannot be ousted by any person not holding a superior title. He held further that the house in question was used for public and charitable purposes from 1909 to 1932, and that the defendant was not estopped from contesting the validity of the trust. On appeal by the plaintiffs, the learned Judges of the High Court held that the adoption of the defendant was invalid under Hindu law, inasmuch as the adoptive mother, Mt. Bhugli, could not by her adoption divest Mt. Durgi of the estate that she held, and that the defendant's claim cannot be maintained for the reasons, that he was present when the property was purchased with the avowed object of building a Dharmasala, that it was with his knowledge and consent that the building was consecrated as a Dharmasala, and that during the course of more than twenty years he never asserted his title to it. They also came to the conclusion that it was for the first time in 1931 that the defendant obtained possession of the property, with the permission of the then manager. In the result, the decision of the Subordinate Judge was set aside and the plaintiffs' suit was decreed.

The law is well settled that in an action for ejectment the plaintiff can recover only by the strength of his own title, and not by the weakness of that of the defendant. Mr. Parikh, appearing for the respondents, admitted at the outset that the provision of the will relating to charity is vague, and is therefore inoperative to create a charitable trust; but he did not admit that the result of the failure of the trust is, as was held by the Subordinate Judge, that the executor must be considered as holding the undisposed of residue as trustee for the benefit of the author of the trust or his legal representative, his position being, that the resulting trust which arises when the trust fails or is void on account of vagueness or uncertainty is a trust against the deed and the property if retained by the executor is *prima facie* held by the executor adversely to the heir-at-law; and if, as in the present case, he dedicates the property to charity, the trust so created, after the expiry of 12 years' adverse possession would acquire a statutory title to it.

The law is well established that where a trustee has been in possession for upwards of 12 years, of property under a trust which is void under the law, an action against him by the rightful owner would be barred by limitation under the statute, the reason being that the possession of the trustee is as much adverse to the true owner as that of any trespasser. Section 10, Limitation Act (Act IX of 1908) says:

". . . no suit against a person in whom property has become vested in trust for any specific purpose or against his legal representatives or assigns (not being assigns for valuable consideration) for the purpose of following in his or their hands such property or the proceeds thereof or for an account of such property or proceeds shall be barred by any length of time."

If this section could successfully be invoked in favour of the appellant, then the respondents would be precluded from relying on the plea of adverse possession in their favour; but Mr. Rewcastle has frankly conceded, and in their Lordships' opinion rightly that the appellant cannot claim the benefit of this section, as it would be impossible to hold that the property in respect of which the direction in the will is void has become "vested in trust for a specific purpose" within its meaning. Since the provision in the will creating the charitable trust is invalid, and section 10, Limitation Act, is inapplicable to the case, it follows that the property is held by the executor adversely to the true owner; and if he so holds it for the statutory period, he would acquire a good title to it.

The learned counsel for the appellant then contended that in this case the executor has shown by his conduct that he did not hold the property for himself, that he held it in no other capacity than purely as executor under the will, that his son after his death continued to act in the same manner, and that, in any event, it has not been shown that the property was dedicated as "Dharmasala," and that Lala Janaki Das and Ramchand have been in adverse possession of it for upwards of 12 years. Neither branch of his argument can be accepted. In support of the first part, reliance was placed on the facts that it was with the proceeds of the sale of the property allotted in the will to charity and other funds of the estate that the property in dispute was bought by Lala Janaki Das, and that the house tax receipts issued by the municipality show that they were issued in favour of the testator Sri Ram, deceased. But this is no proof that the executor was not holding adversely to the heir. Adverse possession having begun in the manner indicated above, the next question is whether it has been proved that the property was dedicated and that it was held in adverse possession by Lala Janaki Das and Ramchand for the statutory period. It may be mentioned, as argument referred to it, that the absence of a deed in this case creating the trust cannot invalidate the endowment, for "no writing is necessary to create an endowment except where the endowment is created by will, in which case the will must be in writing and attested by at least two witnesses if the case is governed by the Indian Succession Act, section 57." (*See* "Principles of Hindu Law," by Mulla, 9th Edition, section 407.)

As stated already, the Subordinate Judge has found specifically "that there is sufficient material on the record to show that the house in question has been used for public and charitable purposes from 1909-1931."

Both Courts have found that the property was dedicated as "Dharmasala." There is ample evidence to show that it was treated as dedicated property and used as such for charitable and religious purposes till the year 1931, when the defendant came into possession. The evidence shows further, that the defendant was aware that the property was purchased with the money allotted by Babu Sri Ram for charitable purposes, that he was present when the sale was registered, that he supervised the construction of the building, and that to his knowledge the building bore the incription "Dharmasala Babu Ram". The inference from the evidence as a whole is irresistible that it was with his knowledge and implied consent that the building was consecrated as a Dharmasala and used as such for charitable and religious purposes, and that Lala Janaki Das, and after him Ramchand, was in possession of the property till 1931. As forcibly pointed out by the High Court in considering the merits of the case, "during the course of more than 20 years that this building remained in the charge of Janaki Das, and on his death in that of his son, Ramchand, the defendant had never once claimed the property as his own or objected to its being treated as dedicated property". This Board held in *Gunga Gobindas Mundal* v. *The Collector of the Twenty Four Pergunnahs*[1], that if the owner whose property is encroached upon suffers his right to be barred by the law of limitation the practical effect is the extinction of his title in favour of the party in possession. Section 28, Limitation Act, says:

> "At the determination of the period hereby limited to any person for instituting a suit for possession of any property his right to such property shall be extinguished."

Lala Janaki Das and Ramchand having held the property adversely for upwards of 12 years on behalf of the charity for which it was dedicated, it follows that the title to it, acquired by prescription, has become vested in the charity and that of the defendant, if he had any, has become extinguished by operation of section 28, Limitation Act. Their Lordships have no doubt that the Subordinate Judge would also have come to the conclusion that the title of the defendant has become barred by limitation, had he not been of the view that Lala Janaki Das retained possession of the suit property as trustee for the benefit of the author of the trust and his legal representatives, and that presumably section 10, Limitation Act, would apply to the case, though he does not specifically refer to the section. For the above reasons, their Lordships hold that the plaintiffs have established their title to the suit property by adverse possession for upwards of 12 years before the defendant obtained possession of it; and since the suit was brought in January, 1933, within so short a time as two years of dispossession, the plaintiffs are entitled to recover it from the defendant, whose title to hold it if he had any has become extinct by limitation, in whichever manner he may have obtained possession, permissively or by trespass.

In the above view, the validity of the defendant's adoption by Mt. Bhugli, the widow of Peari Lal, decided in his favour by the Subordinate Judge and against him by the High Court, does not arise for decision by the Board. Their Lordships will therefore humbly advise His Majesty to dismiss this appeal with costs.

Solicitors for Appellant: *Barrow Rogers & Nevill.*

Solicitors for Respondents: *T. L. Wilson & Co.*

K.S. *Appeal dismissed.*

---

1. (1866) 11 M.I.A. 345 (P.C.) at p. 361.

[PRIVY COUNCIL.]

PRESENT:—LORD ATKIN, LORD ROMER AND SIR MADHAVAN NAIR.

Lala Hakim Rai .. *Appellant**

v.

Lala Ganga Ram .. *Respondent.*

Partnership—Suit for accounts of dissolved partnership against managing partner—Liability for interest.

Where a suit is brought nearly two years after the dissolution of a partnership against the former managing partner, who has been retaining in his hands and for his own purposes assets of the firm without accounting for them or their proceeds to his co-partner interest is properly chargeable against the accounting defendant even though he has not acted fraudulently. *Suleman* v. *Abdul Latif,* (1930) 57 I.A. 245: 58 Cal. 208: 59 M.L.J. 121 (P.C.), distinguished. The plaintiff is entitled to be paid interest on the sum found due from the date of the institution of the suit until realization. The rate of interest to be allowed is entirely a matter in the discretion of the Court.

On appeal from a decision of the High Court of Judicature at Lahore.

W. Wallach for Appellant.

C. S. Rewcastle and *S. P. Khambatta* for Respondent.

The Judgment of the Board was delivered by

LORD ROMER.—This appeal by the plaintiff and cross-appeal by the defendant arise out of a suit brought for the purpose of winding up the affairs of a partnership that existed many years ago between the two parties. The questions that the plaintiff seeks to have decided upon his appeal (apart from a question relating to interest) are questions whether in taking the accounts of the partnership certain items should or should not be allowed on one side or the other. They are purely questions of fact. It is not and cannot be suggested that they involve any question of principle whatsoever. Such being the case, they most emphatically are not questions that ought to be made the subject of an appeal to His Majesty in Council. It is true that the appeal is concerned with only six out of a great number of items appearing in the account, and that two out of the six were very properly abandoned during the argument of the learned counsel for the plaintiff. But that is not to the point. If four of such items are to be regarded as a proper subject-matter of appeal to His Majesty in Council, every such item in the accounts must equally be so regarded. It is not, in their Lordships' opinion, either right or proper that the Board should in this way be required to take partnership or any other accounts. If a question of principle be involved it is, of course, another matter. But where this is not the case, the decision of the Court below on the various items of an account should, in their Lordships' opinion and for the reasons just given, be treated as conclusive unless the appellant can prove that the decision is beyond all question erroneous. With these preliminary observations their Lordships turn to the facts that have given rise to the present appeals.

The appellant and respondent in the appeal (hereinafter referred to as the plaintiff and the defendant respectively) are brothers, and before 16th August, 1914, had been carrying on in partnership the business of extracting and refining saltpetre at two factories, one being situate at Chappanwali, the other at Gujranwala. The business appears to have been managed by the defendant, the plaintiff being merely a sleeping partner. On 16th August, 1914, the partnership was dissolved by mutual agreement. At the same time various items of the partnership property were divided between the parties, as recorded in a document of that date which has been referred to as the deed of partition. It is unnecessary to state the contents of the deed in any detail. It is sufficient to say that the factory at Chappanwali became the sole property of the defendant and the factory at Gujranwala (though at a later date) became the sole property of the plaintiff. Other items of the partnership property not then divided were

*P.C.A. No. 81 of 1939. 22nd June, 1942.

described in the deed as "remaining joint," which their Lordships understand as meaning that such items were to be dealt with later, either by being taken over by one of the partners (as happened in the case of the factory at Gujranwala) or by being realised by the defendant and the proceeds thereof divided between them. Of these latter items the only one that need be mentioned is a stock of crude saltpetre at the Chappanwali factory, against which in the deed appears the figure of 24,984. The deed did not indicate in express terms whether such figure represented value or weight. The item appears, however, in a list of items against each of which appears a figure that unquestionably, and indeed admittedly, represents its value. The *prima facie* inference therefore is that the saltpetre was treated by the parties as being worth Rs. 24,984. As to all the items in such list the deed provides that they shall be divided at the end of the year after the refining of the saltpetre.

On 13th June, 1916, the plaintiff commenced the present suit in the Court of the Senior Subordinate Judge, Gujranwala, claiming to have the partnership dissolved and the usual accounts taken. The case would appear to have been simple enough. No decree dissolving the partnership was requisite. It had been dissolved nearly two years before, as has already been stated. The assets formerly belonging to the partnership, so far as not then partitioned, had been enumerated in the deed of 16th August, 1914. All that would seem to have been necessary was to ascertain how those assets had been dealt with by the defendant; to realise those that still were outstanding; and then to adjust finally the accounts between the parties. Nevertheless, close on 26 years have elapsed since the suit was begun, and the accounts are still the subject-matter of dispute. This scandalous state of affairs reflects little credit either on the parties and their legal advisers or upon the system of procedure that renders such a state of affairs possible. It is fair, however, to say that the proceedings in the suit during the first seven and a half years of its existence were rendered practically abortive through the fault of the plaintiff. For during that period he continued to assert, in spite of the defendant's denial, that the business carried on at Gujranwala had no connexion with that carried on at Chappanwali and was the subject-matter of a wholly distinct partnership between himself and the defendant. He contended accordingly that the suit was concerned exclusively with the Chappanwali business. As will appear presently, it was not until 20th December, 1923, that it was admitted by the plaintiff that the former business was merely a branch of the latter and had belonged to the partnership that was the subject-matter of the suit. In the meantime, *viz.*, on 18th October, 1918, the Subordinate Judge had passed a preliminary decree in the suit. Inasmuch as the cross-appeal is in part founded upon the wording of this decree, the material part of it must be set out in full:

'It is ordered that a preliminary decree be passed in favour of the plaintiff against defendant to the effect that the plaintiff and the defendant Ganga Ram were owners in equal shares of the factory at Chappanwali with all its branches and that the partnership was dissolved on 1st Bhadon Sambat 1971 (16th August, 1914) but the accounts were not finally settled. The factory with all its sites for manufacture of crude saltpetre has gone to the share of Ganga Ram. The plaintiff has no hand in it."

After the passing of this decree the parties appear to have made an attempt to refer all matters in dispute to arbitration. But the attempt failed, and on 10th March, 1920, one Lala Rallia Ram was appointed Commissioner to examine the accounts and report. He reported on 22nd May, 1921, finding that a sum of Rs. 7363 odd was due to the plaintiff. Both parties put in objections to the report, with the result that on 30th June, 1922, the Subordinate Judge reduced the amount due to the plaintiff by nearly Rs. 5,000. Both parties then appealed to the District Judge, and it was when the matter was before him on 20th December, 1923, that the plaintiff at long last admitted that the Gujranwala business had in truth formed part of the partnership property. Why the Court had not found out this for itself years before is one of the many surprising things about this

litigation. In order to wind up the affairs of a partnership properly one of the first things to be ascertained by the Court is of what the partnership assets consist. But, however, this may be, the result of this belated admission of the plaintiff was, of course, that the partnership accounts had to be taken over again. The case was accordingly remanded by the District Judge for this to be done. It might reasonably have been expected that after this lamentable waste of time some effort would have been made to get on with the action. What in fact happened is best described in the language of the High Court at Lahore when giving judgment in the case:

"The record was then sent for in connexion with yet another case between the same parties pending in the High Court where it remained from 1923 to 1926. It was not really required for that appeal, but we have been unable to discover at whose instance it was sent for. The record returned to Gujranwala in December, 1926, and on 7th January, 1927 another Subordinate Judge appointed Sheikh Abdul Majid Asghar, pleader, as Local Commissioner to consider the accounts."

In a case where time has been so recklessly squandered it is pleasing to be able to record that the Local Commissioner made his report on 1st June, 1927. He reported that there was due to the plaintiff Rs. 47,817 odd. He left the question of interest to the Court. On 21st June, 1928, however, the Subordinate Judge held that the Commissioner had considered matters that were outside the scope of the inquiries directed by the preliminary decree. The decree itself, he said, was meaningless, but he considered that according to its true interpretation it only directed an account to be taken of certain leases and stocks of saltpetre. He accordingly reduced the amount due to the plaintiff to Rs. 3,286. He disallowed the plaintiff's claim to be paid interest on what was due to him. The next three years were occupied in appealing to the District Judge, who eventually made an order in May, 1931. It was, however, subsequently held by the High Court at Lahore, for reasons that need not be gone into, that the order was one that the District Judge had no jurisdiction to make. Whether the High Court was right in so deciding is not a matter upon which their Lordships have been invited to express an opinion. For neither of the parties appealed from the decision. But the result was that the appeals from the order of the Subordinate Judge had to be lodged in the High Court itself. Before the High Court a number of items appearing in the accounts were challenged on one side or the other; but of these, as has already been stated, four only are the subject-matter of the present appeal. The first of these (No. 13 in the accounts) raises the question of what sum is properly chargeable against the defendant in respect of the realization by him of the crude saltpetre at Chappanwali. To answer that question it is necessary to ascertain what was the weight of that saltpetre. The plaintiff alleges that it was 24,984 maunds. The defendant, on the other hand, asserts that this sum was its agreed cost in rupees as at 16th August, 1914, and that its weight can readily be found by ascertaining what was the price per maund of crude saltpetre at that time. The High Court decided, in the defendant's favour, that the figure in question was the cost and not the weight of the saltpetre, and that the price at the time was Re. 1-8-0 per maund. They accordingly held that its weight was 16,656 maunds and charged the defendant in the accounts on that footing. There are, no doubt, certain statements and admissions on the part of the defendant to which their Lordships' attention has been called that seem to be inconsistent with these findings. But there was also evidence the other way, and in the circumstances it is sufficient to say that the plaintiff has failed to satisfy their Lordships that the findings were erroneous.

The second of the items in dispute (No. 34 in the accounts) is a sum of Rs. 22,562-10-0, for which the plaintiff seeks to make the defendant accountable on the strength of some unintelligible entries in the partnership books. As to this item the High Court said "the onus is on the plaintiff to show that he is entitled. He has not produced evidence and we would disallow the item." The third item in dispute is a sum of Rs. 963-14-0 (No. 46 in the accounts). The

plaintiff's claim to treat this as an asset of the partnership is founded upon an entry in the books of the firm which states that this amount should be credited to it by the Aryan Bank. The item was dealt with by the High Court as follows: After pointing out that the bank in question was the property of the plaintiff and that the defendant had no share in it, they said that in order to prove his claim to the item the plaintiff should have produced the books of the bank to show that the direction to credit the firm had in fact been carried out. As he failed to produce such evidence they disallowed the claim. At the hearing before their Lordships there was the same absence of evidence in support of these two items as there was before the High Court. In these circumstances it is plain that they cannot be allowed. The fourth item in dispute (No. 20 in the accounts) is a sum of Rs. 600 which the defendant alleges he paid on behalf of the firm, but which the plaintiff says ought not to be allowed to the defendant. The fact that the money was properly so paid was proved by the defendant. His evidence as to this was not contradicted. The High Court accordingly allowed the item to be credited to the defendant. They were clearly right in so doing. The only other question arising on the plaintiff's appeal is the question of interest. The High Court, reversing in this respect the decision of the Subordinate Judge, held that the plaintiff was entitled to be paid interest on the sum found due to him at the rate of 6 per cent. per annum from the date of the institution of the suit until realization. That interest should only run as from the date mentioned, and not from the date of dissolution of the partnership, is now conceded by the plaintiff. But he asks that the rate should be 9 per cent. per annum. His claim to this rate is based solely upon the fact that on one occasion during the abortive proceedings that took place for the first seven and a half years after the institution of the suit the defendant agreed to pay interest at such rate in order to obtain a stay of execution of a decree pending an appeal. But this fact is plainly immaterial. The rate of interest to be allowed was entirely a matter within the discretion of the Court—a discretion that in the present case seems to have been wisely exercised.

Upon the cross-appeal of the defendant there are only two questions that call for a decision. The first is as to the scope of the enquiries directed by the preliminary decree of the Subordinate Judge of 18th October, 1918. It is contended by the defendant that the Subordinate Judge was right in holding that the inquiries were limited to the two matters mentioned in his order of 21st June, 1928. On this point the learned Judge has been overruled by the High Court who have held that the inquiries and accounts should cover all the transactions of the partnership. In this they were unquestionably right. In the first place the preliminary decree does not in terms direct any inquiries or accounts at all, limited or otherwise. In the next place, even if the decree is to be read as impliedly dircting accounts and inquiries, their Lordships can find no reason whatsoever why they should be anything less than the accounts and inquiries that are usual in a partnership action. Finally, the decree was made at a time when, owing to the fault of the plaintiff, the suit was being treated as confined to the business carried on at Chappanwali. After the remand made by the District Judge on 20th December, 1923 the scope of the accounts and inquiries was necessarily extended to cover the whole field of the partnership transactions, even if it had been limited before.

The other question raised by the cross-appeal relates to interest, the defendant contending that no interest at all should be awarded to the plaintiff. In support of this contention the defendant relies upon the decision of this Board in *Suleman* v. *Abdul Latif*[1]. But that case was concerned with an ordinary suit for the dissolution and the winding up of the affairs of a going partnership. The present case is widely different. It is a suit brought nearly two years after the dissolution of a partnership against the former managing partner, who has been retaining in his

1. (1930) 59 M.L.J. 121: L.R. 57 I. A. 245: 58 Cal. 208 (P.C.).

hands and for his own purposes assets of the firm without accounting for them or their proceeds to his co-partner. In such a case interest is properly chargeable against the accounting defendant even though he has not acted fraudulently, as was held by this Board in *Ahmed Musaji Saleji* v. *Hashim Ibrahim Saleji*[1]. In the result and for the reason given, their Lordships are of opinion that both the appeal and the cross-appeal fail and should be dismissed. They will humbly advise His Majesty accordingly. In strictness both appeals should be dismissed with costs. But the costs occasioned by the cross-appeal must be considerably less than those occasioned by the appeal. In order therefore to avoid a double and a somewhat difficult taxation of costs with a set-off, their Lordships think that justice will best be done by ordering the plaintiff to pay one-half of the defendant's costs of the two appeals.

Solicitors for Appellant: *Hy. S. L. Polak & Co.*

Solicitors for Respondent: *T. L. Wilson & Co.*

K.S. *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BYERS.

Chokkalingam Chetty and others .. *Petitioners** (*Accused*)

Defence of India Rules (1939), *rule* 81 (4) (*before its amendment on* 18*th July*, 1942)—*Contravention of Collector's order fixing price of articles under the rule—Not punishable under rule* 81 (4).

Rule 81 (4) of the Defence of India Rules as it stood before the amendment published in the Gazette of India on 18th July, 1942, provided no punishment for the infringement of *an order framed under* rule 81 (2) (*b*) controlling the prices at which articles or things of any description might be sold. The rule, being penal, must be construed strictly and cannot be interpreted in a liberal sense so as to make punishable a contravention of the orders under the rule before it was amended, although this may have been the intention of the framers of the rule.

London County Council v. *Aylesbury Dairy Company*, (1898) 1 Q.B. 106 and *Proctor* v. *Manwaring*, (1819) 3 B. and Ald., 145: 106 E.R. 616, relied on.

Accordingly, a person found selling sugar at 12 annas per viss on 5th July, 1942, in excess of the regulated price of eight and half annas fixed under the Collector's order framed under the Defence of India Rules cannot be prosecuted for an offence under rule 81 (4) of the rules as it stood before the 18th July, 1942.

Petitions praying that in the circumstances stated therein the High Court will be pleased to quash the proceedings in C. C. No. 23 of 1942 on the file of the Court of the Special First Class Magistrate, Dindigul.

K. S. Jayarama Aiyar and *C. K. Venkatanarasimham* for the Accused.

A. S. Sivakaminathan for the Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—The facts necessary for the determination of the question in issue in these two Criminal Miscellaneous Petitions are these. On the 30th of June, 1942, under his delegated powers the Collector of Madura issued an order under rule 81 (2) (*b*) of the Defence of India Rules controlling the price at which sugar might be sold in various parts of the district. On the 5th of July, 1942, the Co-operative Stores at Palani, of which the petitioners are office-bearers, were found selling sugar at twelve annas per viss, the regulated price under the Collector's order being eight and a half annas. They were accordingly prosecuted for contravening rule 81 (2), an offence punishable under rule 81 (4) of the Defence of India Rules.

The only ground urged in support of these petitions to quash the proceedings is that a contravention of the order framed under rule 81 (2) is not made punishable by rule 81 (4) as it then stood prior to its amendment on 18th July, 1942.

---

1. (1915) 29 M.L.J. 70: I.L.R. 42 C. 914: 42 I.A. 91.

*Crl. M. P. Nos. 646 and 648 of 1942. 28th October, 1942.

The relevant portion of rule 81 (2) (*b*) runs as follows, omitting the intervening sub-rules and clauses:

"The Central Government, so far as appears to it to be necessary or expedient for securing the defence of British India or the efficient prosecution of the War, or for maintaining supplies and services essential to the life of the community, may by order provide for controlling the prices at which articles or things of any description whatsoever may be sold."

It is common ground that the order issued by the Collector of Madura was a perfectly valid order under the powers delegated under the Act. Rule 81 (4) prior to its amendment was in these words:

"If any person contravenes any of the provisions of this rule he shall be punishable with imprisonment for a term which may extend to three years or with fine or with both."

In its amended form it now reads thus:

"If any person contravenes any orders made under this rule he shall be punishable with imprisonment for a term which may extend to three years or with fine or with both."

The contention of Mr. K. S. Jayarama Aiyar, the learned advocate for the petitioners, is that prior to its amendment the penal clause contemplated only the contravention of the provision to make an order, and that it was only in its amended form that the sub-rule rendered penal the contravention of an order framed under the provisions of rule 81 (2) (*b*). No discussion is necessary to make it clear that in its original form rule 81 (4) provided no punishment for an infringement of an order framed under rule 81 (2) (*b*). The learned Public Prosecutor has argued that although there is this defect in the sub-rule, the intention in framing it was to make penal the infringement of these orders and, therefore, the rule should be construed in a liberal sense, otherwise rule 81 (4) becomes meaningless. This argument is no doubt plausible but it offends against all recognised principles in the construction of penal statutes. Mr. Jayarama Aiyar has referred to only two cases, the later of which is *London County Council* v. *Aylesbury Dairy Company*[1]. In that case the Court had been invited to read into a particular section words which were not there but which should be deemed to be there on account of the intention of its makers and Wright, J., disposed of this argument with this remark,

"But the mere fact that it may have been better to extend the section to those cases, or that one can apparently gather that such an intention was probable, is not enough to justify us in putting a construction upon the section which would necessitate reading into it the words which the appellants' counsel has invited us to read in. It is clear to my mind that we should, as the Court of Queen's Bench said in *Underhill* v. *Langridge*[2], be taking upon ourselves the office of the Legislature."

Later in the judgment he made the following observation:—

"I have certainly always understood the rule to be that where there is an enactment which may entail penal consequences, you ought not to do violence to its language in order to bring people within it, but ought rather to take care that no one is brought within it who is not brought within it in express language. I am of opinion that the learned Magistrate was right, and that if there be mischief consequent upon the ruling which we are bound to give, that mischief is something which must be removed by application to Parliament."

The earlier case is that of *Proctor* v. *Manwaring*[3], where in dealing with a similar argument Abbott, C.J., used these words:

"This being a penal clause in this Act of Parliament, must not be extended by construction, and though there may be cases suggested, falling within the mischief intended to be prevented by the Legislature, yet, if they had not used proper words, so as to include them within the prohibition, it is not competent for the Court to extend the Act of Parliament to them by construction."

It is abundantly clear that in its unamended form rule 81 (4), contained no provision for punishing the contravention of orders framed under rule 81 (2) (*b*) and that the rule cannot be construed in the liberal sense contended for by the learned Public Prosecutor.

---

1. (1898) 1 Q.B. 106.
2. (1859) 29 L.J. (N.S.) (M.C.) 65.
3. (1819) 3 B. and Ald. 145: 106 E.R. 616.

There is a further argument which has been advanced by him that apart from rule 81 (4); rule 5 in its amended form applies to this case. The relevant portions of this rule are as follows:

"If any person to whom any provision of these rules relates, or to whom any order made in pursuance of these rules is addressed or relates . . . . fails, ... without lawful authority or excuse himself . . . . to comply or to secure compliance, with such provision or order, he shall be deemed to have contravened such provision or order."

Mr. Jayarama Aiyar concedes that under this rule the act of the petitioners in selling sugar was in contravention of the District Magistrate's order but even so, there is no provision in the Act or the rules for its punishment. Rule 81 (4) was amended a few days after the alleged offence and the amendment was published in the Gazette of India only on 18th of July, 1942, so that at the time the rule was contravened there was no provision providing for its punishment. Under these circumstances the proceedings pending before the Special First Class Magistrate of Dindigul in C.C. No. 23 of 1942 are ordered to be quashed.

K.S. ——— *Proceedings quashed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BYERS.

M. Seshagupta .. *Accused.**

Defence of India Rules (1939), *rule* 81 (4)—*Price of copra not controlled by Government, but fixed by local Prices Advisory Committee—Selling article at a price exceeding it—Conviction for, illegal.*

A person cannot be convicted under rule 81 (4) for selling copra at a price exceeding that fixed by the local Prices Advisory Committee as the price of copra has not been controlled by the Government under rule 81 (*b*) of the Defence of India Rules.

Case referred for the orders of the High Court, under section 438 of the Criminal Procedure Code, by the District Magistrate of Bellary in his letter, dated 26th October, 1942.

A. S. Sivakaminathan for the Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

Accused not represented.

The Court made the following

ORDER.—As the price of copra has not been controlled by the Government under rule 81 (*b*) of the Defence of India Rules, the conviction of the accused in Calendar Case No. 56 of 1942 on the file of the Sub-Divisional Magistrate, Adoni, for an offence under rule 81 (4) for selling copra at a price exceeding that fixed by the local Prices Advisory Committee is illegal. The reference made by the learned District Magistrate is accepted, the conviction is set aside and the accused acquitted. The fine is ordered to be refunded.

K.S. ——— *Conviction set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BYERS.

Rama Kamath .. *Petitioner*† (*Deft.*)

v.

C. L. Lobo .. *Respondent* (*Plff.*).

Lunacy Act (*IV of* 1912), *section* 67—*Manager of lunatic's property appointed under—Not competent to sue for recovery of arrears of rent accrued subsequent to date of lunatic's death.*

Where the manager of a lunatic's property appointed under section 67 of the Lunacy Act filed a suit in which the claim for rent related to a period subsequent to the lunatic's death,

Held: The right of action would vest in the heir entitled to take the property after the death of the lunatic. Therefore, whether or not such manager would have power to realise

* Crl.R.C. No. 694 of 1942 (Case Referred No. 51 of 1942). — 3rd December, 1942.

† C.R.P. No. 1998 of 1941. — 9th November, 1942.

assets outstanding at the time of the lunatic's death, in respect of a claim which arose subsequent to the lunatic's death the Court had no jurisdiction to sanction the institution of proceedings nor had the manager any right to maintain the suit.

Nabakumar Singh Dudhuria v. *Fateh Singh Nahar,* (1934) I.L.R. 61 Cal. 986 and In re, *Wheater,* L.R. (1928) 1 Ch. 223, referred to.

Petition under section 25 of Act IX of 1887, praying that the High Court will be pleased to revise the order of the Court of the District Munsiff of Mangalore, dated 28th May, 1941 and made in S.C.S. No. 756 of 1940.

M. G. Kamath for Petitioner.

T. Krishna Rao for Respondent.

The Court delivered the following

JUDGMENT.—The question of law raised in this revision petition is whether the guardian of a lunatic's property appointed under section 67 of the Lunacy Act is competent to maintain a suit after the lunatic's death for the recovery of arrears of rent which accrued subsequent to her death on 19th November, 1939. The learned District Munsiff who decreed the suit in favour of the guardian, there being no dispute about the truth of the claim against the defendant, held that the plaintiff was entitled to maintain the suit by virtue of an order passed by the learned District Judge granting him permission to file suits and take out execution proceedings against the tenants of the estate. The learned advocate for the plaintiff-receiver rests his case in this Court on this order of the learned District Judge and he contends that quite apart from whether it is correct or not, it has not been challenged at any time and therefore it was not open to the defendant to contest it after the time for appealing against it had expired. I do not think there is any substance in this objection, because the order of the learned Judge was plainly one passed in the exercise of his administrative duties in superintending the estate of this lunatic in the same way as he superintends the administration of the estates of guardians and wards and also exercises a general supervision over the conduct of insolvency affairs in his district. In this particular instance no notice to any creditor or any relatives or any other persons who might be interested was issued and I do not consider it was a judicial order against which it was necessary to move in appeal or revision in order to challenge its validity.

The defendant's main objection to the decree against him is that the powers of the guardian ceased with the death of the lunatic, on which date the estate would vest in the lunatic's heirs or, if there are no heirs, would escheat to Government. In support of this contention reliance is placed on two cases. The first is *Nabakumar Singh Dhudhuria* v. *Fateh Singh Nahar*[1], in which it was held that the principles of equity as applied to the practice of the Courts in England should be observed in the Courts of British India in cases in which there is no law extant which laid down a different procedure. The case then under consideration related to the death of one of two joint guardians and the powers of the survivor pending the appointment of a successor but the principle enunciated in that case is relied on. Following this, reliance is placed on the case of In re, *Wheater*[2], in which it was held that the jurisdiction in lunacy ceased on the death of the lunatic and that the Master in Lunacy had therefore no jurisdiction to make an order regarding what should be done with certain funds in respect of which an order had been passed shortly before the lunatic's death. The learned advocate for the plaintiff-receiver has relied on some observations by High in his Commentary on Receivers at page 681 of the third edition but what is stated there is clearly against him. In the lower Court the learned District Munsiff does not appear to have noticed the distinction between an asset which accrued due prior to the death of the lunatic and an asset which accrued subsequent to the death and therefore vested without doubt in the subsequent owners of the estate. While there is something to be said for the argument that the receiver would have power until the appoint-

1. (1934) I.L.R. 61 Cal. 986. 2. (1928) 1 Ch. 223.

ment of an administrator or the grant of probate to realise the assets which belonged to the estate of the lunatic and accrued due before her death, it is difficult to see what jurisdiction he could have over money which did not fall due for payment until after the death of the lunatic. In the present case the claim for the rent relates to a period subsequent to the lunatic's death and so the right of action would vest in the heir entitled to take the property after the death of the lunatic. Therefore, leaving on one side the question whether the receiver would have power to realise assets outstanding at the time of the lunatic's death, I find that in respect of this claim which arose subsequent to the death the Court had no jurisdiction to sanction the institution of proceedings nor had the receiver any right to maintain the suit.

In the result the petition is allowed and the decree of the lower Court set aside and the suit ordered to be dismissed with costs throughout.

K.S. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHMAN.

Dasari Murugappa Mudali .. *Petitioner** (*2nd Respt.-Applt.*)

v.

The Official Receiver, Chittoor and others .. *Respondents* (*Petr.-1st Respt. and his L. R.-Respts.*).

Provincial Insolvency Act (V of 1920), sections 2 (d), *28, 53 and 54—Alienations by a person for himself and as guardian of other members of joint family—Rights of a father—Vesting of power to dispose of son's share in Official Receiver—Karta's right to dispose of member's shares, does not vest in Receiver—Adult member's share—Insolvency Court's duties.*

Alienations were made by one *N* for himself and as guardian of his minor son, his minor brother and his minor cousin, and by his adult brother *E*. *N* was later on adjudicated insolvent on a creditor's petition, and in the insolvency, applications were taken out by the Official Receiver to annul the alienations on the ground that they were nominal transactions and that they also fell within the mischief of section 54 of the Provincial Insolvency Act. The transactions were found not to be genuine. On the question of the extent to which the alienations should be set aside,

Held: (1) The disposing power of a Hindu father in regard to his son's share vests on his insolvency in the Official Receiver. Therefore in the absence of a valid alienation by *N*, his son's share continued to vest in himself (the son) and the right to dispose of such share came, on *N's* insolvency, to vest in the Official Receiver.

(2) The disposing power of a manager does not fall within the definition of "property" as defined in the Provincial Insolvency Act, sections 2 (*d*) and 28 and does not therefore vest in the Official Receiver and he wil not be entitled to ask for an annulment under sections 53 and 54.

(3) Under section 4, however it will be open to the Insolvency Court to decide all questions whether of title or priority or of any nature whatsoever which arise for its determination and hence it will be competent to the Court in the circumstances, to deal with the minors' shares in the joint family property if the debts due by *N* were such as would be binding on the family. The Official Receiver can show that the debts due by *N* were such as would be binding on the minor members and that the device adopted by the insolvent in attempting to do away with their property did not have the desired effect.

(4) So far as the adult brother *E* was concerned, the alienation by him could not be challenged in the insolvency proceedings of *N*, though the purchaser of his undivided share could not have got anything more than an equity to enforce his rights in a suit for partition.

Petitions under section 75 of Act V of 1920, praying that the High Court will be pleased to revise the order of the District Court of Chittoor, dated 30th August, 1939 and made in C.M.A. No. 6 of 1939 preferred against the order of the Court of the Subordinate Judge of Chittoor, dated 10th October, 1938 and made in C.M.P. No. 188 of 1935 in I.P. No. 23 of 1933, etc.

K. Rajah Aiyar and *K. S. Ramamurthi* for Petitioner.

B. Sitarama Rao, T. K. Srinivasa Thathachariar and *V. Seshadri* for Respondents.

*C.R.Ps. Nos. 2568, 2569, 2570 of 1939 and 580 of 1940. 7th April, 1942.

The Court delivered the following

JUDGMENT.—Six alienations were effected by one Nagappa for himself and as guardian of his minor son Subramaniam, his minor brother Srinivasa Mudali, his minor cousin Govindaswami Mudali and by his adult brother Elumalai (who were all members of a joint Hindu family) in August, 1932 (Ex. VIII and Ex. IX), in March, 1933 (Ex. VI) and in May, 1933 (Ex. IV, Ex. V and Ex. VII). Out of these, the alienations covered by Ex. VIII and Ex. IX are substantial. The consideration for the transaction embodied in Ex. VIII is stated to be Rs. 22,500 and for the one contained in Ex. IX a sum of Rs. 6,000. Nagappa was adjudicated insolvent on a creditor's petition presented on the 21st June, 1933. Six applications were made by the Official Receiver, Chittoor to annul these alienations. He asked for these sale-deeds to be set aside both on the ground that they were nominal transactions, (not being transfers for consideration and in good faith) and on the ground that they fell, in any case, within the mischief of section 54 of the Provincial Insolvency Act, as they were brought about with the object of giving fraudulent preference to the alienees who were closely related to the insolvent. These questions were considered in detail by the learned Subordinate Judge of Chittoor and as he was of opinion that the alienations were not *bona fide* and the intention of the parties could not have been to convey any title in favour of the alienees, he allowed the Official Receiver's applications and annulled the alienations evidenced by Exs. IV to IX. The alienees appealed to the District Judge of Chittoor, but without success. Four of the alienees, *i.e.*, those in whose favour Exs. VIII, IX, IV and VII were executed have come up in revision. The alienations covered by Exs. V and VI and said to have been effected for Rs. 1,700 and Rs. 3,000 respectively are thus no longer in issue.

It appears that Nagappa's family had been carrying on a yarn business in partnership with R. W. 7 in whose favour the sale-deed Ex. VIII was executed. As the learned District Judge was not satisfied that the obligations between R. W. 7 and Nagappa's family had been fully worked out at the time when Ex. VIII was executed and as he was of opinion that the transaction contained in that sale-deed was a nominal one, he granted leave to R. W. 7 "to prove before the Official Receiver by a full disclosure of all the accounts, of the capital advanced and of the debts due to the family, for any sum that may be found due to him on this family yarn business". Similarly, the transaction covered by Ex. IX was not upheld by the District Judge as he was of the view that R. W. 1 (the alienee under that sale-deed) was "acting only as the agent of the insolvent," did not intend "to take family property from the insolvent his cousin" and "there was no good faith in a transaction that had for its object the concealment of a large amount of property from the creditors out of all proportion to the debts intended to be discharged thereby." But as the learned Judge was not sure that R. W. 1 had not paid even a small fraction of consideration to Venkatasubbiah Chetti towards the discharge of Nagappa's debts, he permitted R.W. 1 to prove the payment made by him if the debt due by Venkatasubbiah Chetti were really true. In regard to the other alienations, the trial Court's order was not modified.

On the basis of these modifications by the learned District Judge, it is contended by Mr. Rajah Aiyar, learned counsel for the petitioners, that the transactions could not have been set aside as sham or fictitious unless the learned District Judge was of opinion that they were brought about without any consideration at all. In fact, he urged that the findings of the learned District Judge were to a certain extent inconsistent. He argued that in any case it was incumbent upon the lower Courts to come to a definite finding whether any consideration had been due to or paid by the vendees when these sale-deeds were executed in their favour and not to annul them if they were of opinion that the sale-deeds were executed for genuine consideration. I am not, however, impressed by that contention. The real question for the lower Courts to decide was whether the transactions were either wholly or at least to the extent of Nagappa's share or of what he could dis-

pose of intended to be genuine, that is to say, whether the title to the properties had been to that extent intended to be conveyed to the alienees. If that was not the intention, the mere fact that the alienee happened to be a creditor or that one of the alienees had paid some money to one of the creditors of the insolvent under his direction would not be enough. In the first case, the alienee's debt would not be extinguished; in the other, if any money was advanced by the alienee, he would be entitled to be reimbursed by or on behalf of the insolvent. The question whether the transactions were of a genuine character or otherwise is a question of fact and once it has been determined by both the Courts on a full consideration of all the facts and circumstances it is not, in the absence of anything that would vitiate that finding, possible for me to interfere in revision.

The main legal contention on which attention has been devoted by learned counsel for the parties is whether having regard to this conclusion, the transactions have to be set aside only to the extent of the insolvent's share or of what he had disposed of himself both on his behalf and on behalf of the minors or as a whole. It has been contended by learned counsel for the petitioners that it is impossible for the Court to set aside the alienations as a whole,

(*a*) as Elumalai was, being an adult, himself a party to the sale-deed and the lower Courts had no jurisdiction to set aside the alienation so far as his share was concerned when he was not even a party to the insolvency proceedings;

(*b*) as whatever may be said in regard to the share of the insolvent's son which would be liable to be sold for the debts of the insolvent if they were not illegal or immoral and in respect of which the insolvent had a power of disposal, the same cannot be said in regard to the shares of the others (his minor brother and minor cousin) whose shares were not liable to be sold by the insolvent as they were under no pious obligation to discharge his debts and as to which he had the power of disposal only when the debts for which these alienations were effected were found to have been incurred for family benefit or necessity;

(*c*) as the powers of an insolvent (who happens to be a manager or kartha of a joint family) to dispose of the right, title and interest of such other members of his family in the family property as did not happen to belong to his sons cannot vest in the Official Receiver. But if even if this were not so, the Official Receiver cannot, it was urged by learned counsel for the petitioners, have the power to recover the property conveyed by the insolvent. And this is because the power of disposal has been exercised by the insolvent and exhausted. To hold otherwise would amount to conferring a right on the Official Receiver to recover the property with the object of exercising his power of disposal. The right to recover joint family property could only vest, according to Mr. Rajah Aiyar, in the members of the joint family and not in the Official Receiver; and

(*d*) as it was not open to Nagappa to derogate from his own grant and to contend that the alienations by him on behalf of the minors were infructuous and in so far as the Official Receiver cannot be held to have any larger powers at least in this respect, he could not attack the alienations on behalf of the minors either.

It was, on the other hand, contended by Mr. Sitarama Rao, learned counsel for the respondent, that the Insolvency Court might have had a limited power under section 53 or 54 of the Provincial Insolvency Act but had a much wider power under section 4 of the Act. If the transactions were sham and fictitious, the insolvent's power of disposal over the property purported to have been alienated under Ex. IV and Exs. VII to IX remained intact and the Insolvency Court as competent to decide the question that the properties dealt with under these documents still continued to vest in the joint family and to remove the cloud which had come to rest on them not only by Nagappa's action but by the action of Elumalai as well. The manager's power to deal with the joint property was according to learned counsel for the respondent, itself "property" within the meaning of section 2 (*d*) of the Insolvency Act and must be held to vest in the Insolvency

Court or the receiver under section 28 (2) of the Act. As for the alienations effected on behalf of the minors, it was urged that in so far as they were members of a joint Hindu family, it was not possible for Nagappa to act as their guardian and he must be held to have acted in his capacity as a kartha of the family. And if the alienation is found to be sham, it has got to be so declared not only to the extent of Nagappa's individual share in the joint family property but to the extent of the other's share which he attempted to do away with in his garb as a guardian. As for the participation of Elumalai in these alienations, he contended that an alienation before partition by a junior member of a joint Hindu family of his share in the property for value even in provinces like Madras where he was entitled to dispose of it was not an alienation of his share in the family property but only that of an equity as held by a Division Bench of this Court in *Nanjaya Mudali* v. *Shanmugha Mudali*[1], and by a Full Bench in *Koduru Venku Reddi* v. *Mugunta Venku Reddi*[2], and if the alienations are found to be sham and fictitious and his share continues to be liable for the debts of the family, they must fail in their entirety and could not be validated either wholly or even partially as the only adult number of the family had joined the kartha in effecting them. It was urged that his participation in the alienations in question was merely with the object of showing his concurrence to the valid family purpose for which they were being effected and should not be taken as proof of the fact that he was transferring his own share in the joint family property as distinct from the shares which Nagappa had been trying to alienate on behalf of himself and for the other minor members of his family.

The property of the insolvent vests in the Court or in the Receiver on the making of an order of adjudication under section 28 (2) of the Provincial Insolvency Act. The term "property" is defined in section 2 (*d*) of the Act and is stated to include "any property over which or the profits of which any person has a disposing power which he may exercise for his own benefit." It would therefore follow that the "disposing power" possessed by a person which "he may exercise for his own benefit" would vest in the Court or in a receiver under section 28 (2) of the Act. It is unnecessary in my opinion to think of cases in which a person cannot exercise the disposing power. If he can in a given set of circumstances exercise that power for his own benefit, it would fall within the term "property" and would vest in the Court or Official Receiver. There can be no manner of doubt that a Hindu father can dispose of his son's property for the payment of his own debts if they were not immoral or illegal and for which his own share of the joint property or his own personal property was liable to be sold. The payment of such debts would be obviously for the father's benefit.

There is a very learned and elaborate discussion as to the meaning of the term "property" by a Full Bench of five Judges in *Anand Prakash* v. *Narain Das Dorilal*[3], and I find myself in respectful agreement with what was the majority view expressed by Mr. Justice Mukerji in his leading judgment. The facts mentioned by the learned dissenting Judge that "the undivided interest of the sons in the joint ancestral property is not the property of the insolvent" or that a father "has no absolute power of disposal and can exercise it only when "certain conditions are fulfilled or that he cannot make a gift of the property in whole or in part *in praesenti*" or that "he cannot transfer his undivided share by testamentary devise" are, in my opinion, irrelevant. Nor is the fact that the Provincial Insolvency Act happens to be "a general statute applicable to Hindus, Mohammedans, Christians, Buddists and Sikhs" of any consequence. What does it matter if anyone of these is possessed of certain powers under his personal law which he can exercise in respect of property belonging to his son for his own benefit but which a person following another faith does not possess? It is unnecessary that every insolvent

1. (1913) 26 M.L.J. 576: 38 M. 684. (F.B.).
2. (1926) 52 M.L.J. 387: 50 M. 535
3. (1930) I.L.R. 53 All. 239 (F.B.).

of every faith must have the same kind of property. I fail to see what bearing have the questions whether a Hindu father is "competent to sell that power and can the purchaser exercise the power in his own account" on the point whether the disposing power falls within the definition of the term "property" given in section 2 (*d*) of the Act. The disposing power of a person would fall within that term whether he is competent to sell it or not. Alienability of that power has not been stated to be the determining factor in the definition of that term but the capability of exercising the same for his own benefit is the test. Moreover, one should not confuse a right of ownership with a power of disposal. They are two different things. A right of disposal is ordinarily involved in the right of ownership but the possession of a mere right of disposal does not necessarily indicate ownership. If the distinction between the right of ownership in the share of the property which a Hindu son undoubtedly has before partition and the father's power of disposition of his son's share were to be kept in mind, the decision of their Lordships in *Sat Narain* v. *Behari Lal*[1], would be easily understandable. The mere fact that the father is found to possess a disposing power does not take away by itself the right of the sons from out of the joint property and it was on the basis of that ownership that the son's right of pre-emption was allowed to prevail in that case. Before the exercise of the disposing power which Rai Bahadur Sri Kishendas possessed, his son, who was the plaintiff in that suit, could not be said to have lost his right in the property on the basis of which the suit for pre-emption was instituted. It was in that connection that their Lordships pointed out in their judgment that the father's power of disposal of joint property was not "absolute but conditional on his having debts which are liable to be satisfied out of that property." They did not hold that the disposing power of the father (which can only be exercised on certain conditions) would not on his insolvency vest in the receiver but their decision was only to the effect that the share of joint property which the plaintiff had could not be held to have vested in the Official Receiver on his father's insolvency so as to deprive him of his right to bring the suit for pre-emption.

My attention was drawn to a decision of Sundaram Chetti, J., in *A.L.S.P.B.L. Subramaniam Chettiar* v. *Subbaraya Goundan*[2], where the learned Judge held that the alienation on behalf of the sons could not be viewed as a transfer by the insolvent for the purposes of sections 53 and 54 of the Insolvency Act. But the learned Judge did not take the definition of the word "property" into consideration and there is nothing in that judgment which comes into conflict with what I have stated above. The learned Judge was guided by the only consideration that the transfer by the insolvent was different from the transfer by him of his son's share. Having given a reply to that question, he assumed that on the annulment of one, the other would not follow as a matter of course. If the transaction was sham or fictitious and if the title to the property was not intended to be conveyed by the father either on behalf of himself or on behalf of his sons, the property would have continued to vest in the father and in the sons in spite of its apparent but fictitious transfer and as long as the property remained in the insolvent and his sons, the father's right of disposal over his son's share would remain intact *Raoji Bapuji Pandarkar* v. *K. L. Bawachekar*[3]. I am inclined to respectfully accept the view taken by my esteemed brother Pandrang Row, J., in *S.P.P.L. Palaniappa Chettiar* v. *Official Receiver, Madura*[4], and agree with the observation that if a transfer is made by an insolvent, the whole of it could be, in certain circumstances, annulled by the Court. I have looked through the judgment in (1939) 2 M.L.J. 43 and 44 (short notes) but it gives no reasons and may be supported, on the ground (as I shall show later) that the alienation was effected in that case by a person on behalf of his minor brother. This makes a

1. (1924) 47 M.L.J. 857: I.L.R. 6 Lah. 1: L.R. 52 I.A. 22 (P.C.).
2. A.I.R. 1935 Mad. 246.
3. A.I.R. 1935 Bom. 316.
4. (1937) 2 M.L.J. 427.

considerable difference in my judgment. The only other decision which was brought to my notice was that of Panckridge, J., in *Re Tilakchand Koyal, Ex-parte the Official Assignee*[1]. The judgment is very brief and appears to have been based on a misapprehension of the decision in *Sat Narain* v. *Beharilal*[2]. It is now well settled that the disposing power of a Hindu father in regard to the property of his sons vests on his insolvency in the Official Receiver. (See *T. S. Balavenkata Sitarama Chettiar* v. *Official Receiver, Tanjore*[3]; *Lakharaghula Sundaramma* v. *Desika Venkatachalamiah*[4], and lastly the recent decision of the Privy Council in *Sat Narain* v. *Sri Kishen Das*[5]. I would therefore hold that in the absence of a valid alienation by Nagappa, Subramaniam's share continued to vest in him (*i.e.,* Subramaniam) and the right to dispose of that share came, on Nagappa's insolvency, to vest in the Official Receiver.

The next question to decide is whether the power of the insolvent to deal with the share of his minor brother and minor cousin would also fall under section 28. It is not easy to agree that the manager's power to dispose of the property for a family benefit or necessity can also be held to be covered by the definition of the word 'property' in section 2 (*d*) of the Act, although I find that an eminent Judge of this Court was inclined to take that view in *Rangayya Chetti* v. *Thanikachala Mudali*[6]. The learned Judge appears to have made no distinction between the disposing power of a father and that of a manager in dealing with the coparcenary or family property. After holding that the father could dispose of the family estate for his own benefit at least *prima facie* and subject only to the rights on which the sons could rely in particular cases, he proceeded to observe as follows:

> "Nor as to the 2nd defendant am I able to see any sound distinction in principle between his case and that of the case of the other defendants just referred to. For if the son's share is property which the father has power to dispose of for his own benefit in the restricted sense explained by West, J., ... how can the share of any other undivided coparcener which the managing member can convey for debts incurred by him for legal necessity, be treated different."

The answer to that question is, in my opinion, to be found in the definition of the word "property". A father's power of disposal falls within the term "property" as he can exercise it for his own benefit but the manager's power to dispose of the family property would not be so as he could not exercise it for his own benefit but only for the benefit of the family. And in this view I am supported by what Mr. Srinivasa Aiyangar has stated in his edition of Mayne's Hindu Law at page 457 in paragraph 350-a. It is true that the observations in the *Official Assignee of Madras* v. *Allu Ramachandra Aiyar*[7], are rather general and refer to the insolvency of a managing member of a joint Hindu family but it must not be overlooked that the learned Chief Justice and Coutts-Trotter, J., (as he then was) were only called upon to decide whether the disposing power of the father so far as it could be exercised by him for his own benefit did not vest in the Official Assignee and if so, whether the latter was not as a representative of the insolvent, entitled to possession of the joint property. In view of the facts of that case, the expression "the managing member" must be held to refer to the father which he undoubtedly was and the word 'member' to the sons. The decision in the *Official Assignee, Madras* v. *Allu Ramachandra Aiyar*[7], could not be held to be against the meaning I am inclined to assign to the term 'property'. I am aware of the decision in the *Official Receiver, Anantapur* v. *Ramachandrappa*[8], where Devadoss, J., had on a difference between Odgers, J. and Curgenven, J., taken the view that the power of a manager to dispose of joint family property

1. (1941) 46 C.W.N. 256.
2. (1924) 47 M.L.J. 857: 52 I.A. 22: I.L.R. 6 Lah. 1 (P.C.).
3. (1926) 51 M.L.J. 269: I. L. R. 49 Mad. 849 (F.B.).
4. A.I.R. 1939 Mad. 438.
5. (1936) 71 M.L.J. 812: 63 I.A. 384: I.L.R. 17 Lah. 644 (P.C.).
6. (1895) I.L.R. 19 Mad. 74.
7. (1922) 43 M. L. J. 569: I.L.R. 46 Mad. 54.
8. (1928) 55 M. L. J. 721: I.L.R. 52 Mad. 246.

for debts vests in the Official Receiver. But this was mainly because of the decision in *Rangayya Chetti* v. *Thanikachala Mudali*[1], to which I have already referred —although if he had considered himself free to decide, he would have taken the extreme view that even the power of a Hindu father to dispose of his son's share did not vest in the Official Receiver. I find nothing however, restraining me from giving effect to the conclusion at which I have arrived on an interpretation of section 2 (*d*) and section 28 of the Provincial Insolvency Act. The decision in *Shankaranarayana* v. *Official Receiver, South Kanara*[2], does not touch the question under consideration as the learned Judge had only decided in that case that an Official Receiver was, on a father's insolvency, entitled to be in joint possession with his sons and had a right to grant lease and collect rents even in respect of the son's share for the purpose of paying his father's debts.

It may be stated here that one of the contentions advanced by learned counsel for the petitioners was that inasmuch as Nagappa had purported to alienate the property on behalf of his minor brother and cousin as their guardian and not as a kartha of the family, it will be wrong to treat that transaction as having been effected by him in his capacity as a kartha. Reliance was placed in this connection on the following observation of a Full Bench decision of this Court in *Narayana Aiyar* v. *Venkataramana Aiyar*[3],

"But it seems clear that, when a creditor deals, not with the managing member only of a family, but with all the members of the undivided family as co-obligors and on that footing enters into a transaction thereby avoiding any question as to whether the transaction was really for the benefit of the family he cannot rely upon an acknowledgment of the liability, made by one of them, as an acknowledgment duly made on behalf of all the co-obligors, by reason only that the person acknowledging is in fact the managing member of the family consisting of the co-obligors."

I am not prepared to accede to this contention as Nagappa could not legally act as a guardian on behalf of his minor brother and cousin (see *Gharib Ullah* v. *Khalak Singh*[4],) and in so far as he happened to be kartha of the family, his description as a guardian in the sale-deeds will have to be characterised as erroneous although found to be immaterial (*Kona Adinarayana* v. *Dronavalli Venkatasubbiah*[5], and *Dhapo* v. *Ramachandra*[6]).

It has been concurrently found by both the lower Courts—and the finding has been accepted by me—that Nagappa did not intend to convey any title to the property by these sale-deeds. It must therefore be held that no title was conveyed by him on behalf of his minor brother and minor cousin as well. These minors must therefore be found to be owners of their shares in the joint family property. But as I have found that the disposing power of a manager does not fall within the definition of the term "property" as defined in the Provincial Insolvency Act and does not therefore vest in the Official Receiver, he is not entitled to ask for an annulment under sections 53 or 54 of the Act.

The question then to decide is whether the Court would be, in the circumstances, justified in dealing with the minors' shares in the joint family property if the debts due by Nagappa were such as would be binding on the family. The applications made by the Official Receiver to the Insolvency Court were under sections 4, 53 and 54 and it is obvious that in view of the interpretation that I have placed on the term "property", the alienations by Nagappa, although ineffectual, could not be annulled by the Court under sections 53 and 54. It was contended by Mr. Sitarama Rao that the terms of section 4 are wide enough and the insolvency Court has under that section

"full power to decide all questions whether of title or priority, or of anything whatsoever . . . which may arise in any case of insolvency coming within the cognizance of the

1. (1895) I.L.R. 19 Mad. 74.
2. (1932) 36 L.W. 581.
3. (1901) I. L. R. 25 Mad. 220 at 234 (F.B.).
4. (1903) L.R. 30 I.A. 165: I.L.R. 25 All. 407 at 416 (P.C.).
5. (1937) 2 M.L.J. 653.
6. (1934) I.L.R. 57 All. 374.

Court or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such cases."

Learned counsel for the petitioners on the other hand urged that the insolvency Court would have no jurisdiction to go into the alienations effected by Nagappa on behalf of the minors. He cited the decision in *Palaniappa Mudali* v. *Official Receiver, Trichinopoly*[1], in support of his contention. But that case has, in my opinion, no application as the sale in that case was not made by the insolvent alone but also by his father and grandfather who were not adjudicated as insolvents. It was only in regard to the sales by the insolvent's father and grandfather that the Court was held to have no jurisdiction. Whatever may be the effect of this decision in regard to Elumalai's alienation, the fictitious sales by Nagappa as a kartha on behalf of the minor members stand on a different basis. If there had been no alienations of their shares at all so far, their shares would be liable for the debts incurred by Nagappa for the family benefit or necessity. And if section 4 of the Provincial Insolvency Act provides a machinery for the expeditious disposal of all matters arising directly or indirectly, in the course of the administration of the estate and invests the insolvency Court with the power to decide all questions whether of title or priority or of any nature whatsoever which arise for its determination, as in my judgment it does, there is no reason why this question should not have been determined by the Insolvency Courts. There are a number of decisions in which the Courts have exercised the jurisdiction under this or under the corresponding section 7 in the Presidency Towns Insolvency Act. (See *Doriappa Aiyar* v. *The Official Assignee, Madras*[2], *Akella Ramasomayajulu* v. *Official Receiver, Godavari*[3], *Anwar Khan* v. *Muhammad Khan*[4], *Official Assignee, Madras* v. *Narasimha Mudaliar*[5], *Palanivelu Odayar* v. *Official Receiver, West Tanjore*[6], *A. N. Ramachandra Iyer* v. *Official Assignee, Madras*[7], *Biseswara Chauduri* v. *Kanhai Singh*[8], and *Badilam Narayanamma* v. *Neti Venkatasomayalulu*[9]).

There is no force in the contention that it is not open to the Official Receiver to attack the sale-deed executed by Nagappa as Nagappa himself could not derogate from his own grant and could not contend that the alienations on behalf of the minors were infructutous. The Official Receiver is not always a representative of the insolvent only. He has more often than not to fight out the insolvent and to represent the body of creditors frequently. He could certainly show that the debts due by Nagappa were of such a nature as would be binding on the other minor members and the device adopted by the insolvent in attempting to do away with their property did not have the desired effect.

As for Elumalai's share however, I am of opinion that since he had disposed of the property himself, the alienations by him could not be, as held in *Palaniappa Mudali* v. *Official Receiver, Trichinopoly*[10], challenged in insolvency proceedings although the purchaser of his undivided share could not have got anything more than an equity to enforce his rights in a suit for partition and would only take the share when partitioned subject to such liabilities as his vendor might have been liable to discharge before the date of his alienation.

For the above reasons, I must accept the revisions and refuse to set aside the alienation in regard to Elumalai's share which is admitted by the parties to be one-sixth. As to the rest the revisions fail and are dismissed.

Since the petitioners have only partially succeeded the most appropriate order appears to be, in the circumstances to order them to take and to pay proportionate costs according to their success and failure in this Court, *i.e.*, five-sixths and one-sixth.

K.C. ——— *Petitions partly allowed.*

1. (1916) 32 M.L.J. 84.
2. (1921) 42 M.L.J. 141.
3. (1926) 23 L.W. 80.
4. (1929) I.L.R. 51 All. 550.
5. (1929) 57 M.L.J. 145: I. L. R. 52 Mad. 717 (F.B.).
6. (1931) 61 M.L.J. 763.
7. (1930) 61 M.L.J. 66: I. L. R. 54 Mad. 739.
8. (1931) I.L.R. 11 Pat. 9.
9. (1934) 67 M.L.J. 616.
10. (1916) 32 M.L.J. 84.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Iskapalle Ramiah .. *Petitioner* (Deft.-Petr.)*

v.

Meda Ramiah .. *Respondent (Plff.-Respt.).*

Madras Agriculturists' Relief Act (IV of 1938)—Scaling down of mortgage-debt—Security within British India though parties living outside—Applicability of the Act—Appellate decree passed after coming into force of Act—Procedure to be adopted to subject the matter to provisions of the Act.

A petition for scaling down a mortgage-debt was filed in the appellate Court during the pendency of an appeal from the mortgage-decree. In dismissing the appeal the Court directed that the proper authority to be moved in the matter of scaling down the decree was the trial Court. Before that Court it was contended (1) that the mortgage was entered into in renewal of a previous debt contracted outside British India, that the parties also had their permanent residence outside British India and that therefore the Madras Act (IV of 1938) would not apply to the matter, and (2) that since the appellate decree was passed after the coming into force of the Act (IV of 1938) there could be no scaling down of the decree by the trial Court. These contentions were upheld. On revision,

Held: (1) That the residence of the person applying for scaling down will not affect his status as an agriculturist if he has a saleable interest in agricultural lands in the Province of Madras.

(2) That the debt which was the subject of litigation was the contract of mortgage executed within the Madras Presidency binding a security which is land situate within the Madras Presidency and hence the contract must necessarily be governed by the laws of this presidency.

Mount Albert Borough Council v. *Australian Temperance and General Mutual Life Assurance Society*, (1938) A.C. 224 (P.C.), relied on.

(3) That the petition should have been treated as a matter arising in the appeal for which provision would have to be made in the appellate judgment and that the difficulty caused by the disposal in the present case could be met by a review petition to the lower appellate Court to make the necessary provision in the appellate decree for the decree being made subject to the order to be passed on the petition under Act IV of 1938.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the District Munsiff of Nandyal, dated 31st March, 1941 and made in I.A. No. 7 of 1940 in O.S. No. 790 of 1933.

K. S. Jayaram for Petitioner.

A. C. Sampath Aiyangar for Respondent.

The Judgment of the Court was delivered by

Wadsworth, J.—The petitioner was indebted to the respondent under a mortgage-deed, dated the 28th January, 1929. The respondent sued on the mortgage and got a decree on the 31st August, 1937. That decree was the subject of an appeal to the District Court. When the Madras Act IV of 1938 came into force the petitioner filed a petition in the appellate Court praying for relief under the Act in respect of the decree. The petition was posted along with the appeal and on the day on which the learned District Judge dismissed the appeal he passed an order on the petition to the effect that,

> "the Court which has to be moved for the scaling down of the debts is the Court that passed the decree. I forward the petition and connected records filed in this suit to the learned District Munsiff of Nandyal for disposal according to law."

There was no reservation made in the appellate judgment providing that the appellate Court's decree would be subject to the result of the petition which was sent to the District Munsiff for disposal. When that petition came up before the District Munsiff objections were taken on the grounds that the petitioner and the respondent both resided in Banganapalli outside British India and that the suit mortgage was executed to secure an account debt incurred in Banganapalli outside British India. At the end of the argument a fresh contention was taken that there could be no scaling down of the decree since the appellate Court's decree was passed after

*C.R.P. No. 1332 of 1941. 16th November, 1942.

Madras Act IV of 1938 had come into force. The trial Court upheld all these contentions and the petition was dismissed.

It seems to us that the only contention which requires detailed consideration is that which relates to the difficulty of procedure. The residence of the petitioner will not affect his status as an agriculturist. The definition of an "agriculturist" imposes the qualification that he should have a saleable interest in agricultural land in the Province of Madras and we feel quite unable to read into this definition any qualifying words with reference to the residence of the agriculturist, such as Mr. Sampath Aiyangar for the respondent suggests should be spelt out of the words "agriculturists in the Province of Madras" used in the preamble to the Act. The suggestion that this mortgage-debt is one which is outside the jurisdiction of the Madras Legislature is also untenable. From the terms of the mortgage it is quite clear that this was not a case of a mere giving of security for a pre-existing debt. The mortgage contract contains all the terms of the liability and imposes conditions which are quite different from those imposed by the pre-existing liabilities which are discharged under this mortgage. The debt which was the subject of the litigation was the contract of mortgage executed within the Madras Presidency binding a security which is land situated in the Madras Presidency. Such a contract must necessarily be governed by the laws of this Presidency—a fact which has been recognised by the respondent himself who filed his suit in the Court of the District Munsiff of Nandyal. The matter is governed by the decision of the Privy Council in the Mount Albert Borough Council case (*Mount Albert Borough Council* v. *Australasian Temperance and General Mutual Life Assurance Society.*) We do not wish to say anything at this stage on the question whether in scaling down the debt the fact that the previous liability which was discharged was a liability incurred outside British India will affect the process; but we are unable to accept the view of the District Munsiff on either of the objections taken to the merits of the petition.

Turning now to the difficulties of procedure we find that the trouble really arose through the action of the learned District Judge in transmitting the petition to the District Munsiff, without realising that it was really a petition arising in the appeal with reference to which provision ought to have been made in the appellate judgment. We do not wish to criticise the learned District Judge who shared the difficulty felt by nearly all the Courts in deciding what was the proper procedure to observe in applying this new Act to decrees pending appeal at the time when the Act came into force. At the same time we are clear that this petition should have been treated as a matter arising in the appeal for which a provision would have to be made in the appellate judgment, and when the learned District Judge transmitted the petition to the District Munsiff for disposal, he must, we think, be deemed to have remanded to the District Munsiff an issue arising in the appeal. It is pointed out that difficulties may arise in execution if the disposal of this petition results in the scaling down of the decree-debt, whereas the decree to be executed will be the unamended decree of the learned District Judge in appeal. We are conscious of this difficulty and think that it may well be met by the petitioner applying to the District Judge by way of review to make the necessary provision in the appellate decree for that decree being subject to the order to be passed on the petition under Act IV of 1938. If this is done, no difficulty will arise in execution and we do not think that the petitioner should suffer, he having adopted the proper procedure of filing a petition in the pending appeal from the fact that this petition was sent down for disposal without providing in the appellate judgment for the incorporation of the results thereof. If the petitioner does file a petition for review as suggested, it will of course be necessary for him also to apply to the District Judge to excuse the delay in the rather unusual circumstances of this case.

The learned District Munsiff has not given any finding as to the effect of

1. (1938) A.C. 224 (P.C.).

applying the Act to this decree. The civil revision petition is therefore allowed with costs and the application is remanded to the lower Court for fresh disposal in the light of this judgment.

K.C. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Koorapati Seshavatharam .. *Appellant** (*Petr.-Applt.*)

v.

Thalasila Ramayya and another .. *Respondents* (*Respts.-Respts.*).

Madras Agriculturists' Relief Act (IV of 1938), section 24—Sale in execution set aside after decree-holder had drawn out the decree amount from Court—Respective rights of parties and the purchaser—Re-delivery of property resisted—Right of judgment-debtor to mesne profits.

Where after the decree-holder in a mortgage suit had drawn out from the proceeds of the sale held in execution of the decree, an amount necessary to satisfy his decree, the sale in execution is set aside on an application under section 23 of Madras Act IV of 1938 and the decree is scaled down, the auction-purchaser's right is to get back his money in full from the person to whom it had been paid, as the sale shall be deemed not to have taken place at all. The decree-holder has to give back the money which he has drawn out and he remains at liberty to execute any amended decree which may be passed in the scaling down proceedings. In such circumstances there can be no question of any refund of the sale price by the judgment-debtor. Nor can the auction-purchaser retain possession of the property pending a payment by the judgment-debtor of the amount due from him under the mortgage-decree.

Where such auction-purchaser resists an application for re-delivery of the property after the sale has been cancelled under section 23, the judgment-debtor is entitled to mesne profits for the period subsequent to the cancellation of the sale.

China Kondayya v. *Ramalinga Reddi*, (1941) 2 M.L.J. 1060, distinguished.

Appeal against the order of the Court of the Subordinate Judge of Masulipatam, dated 18th October, 1940 and made in A.S. No. 87 of 1940 (A.S. No. 211 of 1940, District Court, Kistna) preferred against the order of the Court of the District Munsiff of Masulipatam, dated 28th October, 1939 and made in C.M.P. No. 1406 of 1939 in O.S. No. 576 of 1934.

B. Manawala Chowdri for Appellant.

A. Lakshmayya for Respondents.

The Judgment of the Court was delivered by

Wadsworth, J.—This appeal raises a question connected with section 24 of Madras Act IV of 1938. The appellant here was the judgment-debtor in a decree on a mortgage under which he was required to pay Rs. 1,300 and odd. The decree-holder is the second respondent. In execution of that decree the properties of the appellant were sold on 29th November, 1937, and realised Rs. 1,900 and odd. On 17th March, 1938, the decree-holder drew out of Court from the sale proceeds an amount necessary to satisfy his decree. A small sum was also drawn by an attaching decree-holder and the balance remained in Court. On 25th February, 1939, on an application under section 23 the sale was set aside, apparently without objection on the ground of the decree having been fully satisfied before Act IV of 1938 came into force. We are informed that the decree has since been scaled down under section 19 so as to make the judgment-debtor liable only for Rs. 548-7-7 with interest at six per cent. from 1st October, 1937.

After the sale was set aside, an application was filed by the judgment-debtor for re-delivery of the properties and another application by the purchaser for the re-payment under section 24 of the balance of the sale proceeds, he having already drawn the amount remaining in Court deposit. The latter application was ordered and on the former application for re-delivery the lower Court held that the principle of *Jai Berhma* v. *Kedar Nath Marwari*[1] applied and that the judgment-debtor

*A.A.A.O. No. 241 of 1941. 9th November, 1942.

1. (1922) 44 M.L.J. 735: L.R. 49 I.A. 351: I.L.R. 2 Pat. 10 (P.C.).

should not be entitled to obtain re-delivery of the property without paying to the Court auction-purchaser the whole of the amount which had gone in discharge of the decree. We are not now concerned with the correctness of the orders under sections 23 and 19 of the Act.

It seems to us clear that the order refusing re-delivery to the judgment-debtors cannot be supported. The case on which the lower Court relied has really no application to the peculiar position resulting from the setting aside of a sale under Madras Act IV of 1938. Such a sale is set aside with a view to the reopening of the decree, which may result either in the complete satisfaction of the decree after it has been scaled down or in the passing of what is in effect a fresh decree for a different amount. The auction-purchaser is given under section 24 the right to get back his money in full from the person to whom it has been paid and section 23 expressly states that the sale shall be deemed not to have taken place at all. That is to say, the satisfaction of the decree out of the purchaser's money is cancelled just as the sale is cancelled. The decree-holder has to give back the money which he has drawn and he remains at liberty to execute any amended decree which may be passed in fresh proceedings. There can be no question in such circumstances of the payment made by the auction-purchaser having benefited the judgment-debtor. The decree towards which the payment was made is one that has been into the melting pot and as a result of the application of section 19 it may well disappear entirely. The decree-holder is not debarred by reason of his having drawn the proceeds of the sale from executing any revised decree which may be passed, but he is required to refund the sale proceeds to the auction-purchaser. In such circumstances, there can be no question of any refund of the sale price by the judgment-debtor. Nor is there any necessity to allow the auction-purchaser to retain possession of the property pending a payment by the judgment-debtor of the amount due from him under the mortgage-decree. The decree towards which the purchaser's money has gone has, in fact, by the setting aside of the sale, come to be treated as a decree which necessarily has to undergo a process of revision and the proper remedy for the purchaser is the remedy laid down in the Act of applying for a refund under section 24 of the money by the person to whom it has been paid.

The appellant here is willing to deposit into Court the amount of the decree as scaled down and he is directed to do so within one month. The purchaser will re-deliver the properties forthwith. If and when the judgment-debtor deposits the amount of the amended decree, this money, which is in fact the money of the decree-holder, may be drawn by the purchaser in reduction of the amount which the decree-holder has to pay to him.

The appellant has also claimed mesne profits from the date on which the sale was set aside. In *China Kondayya* v. *Ramalinga Reddi*[1], we held that the judgment-debtor was not entitled to claim mesne profits for the period between the date of the sale and the date on which the sale was cancelled under section 23. We did not then consider the question whether if the purchaser resists an application for re-delivery of the property after the sale has been cancelled under section 23, the judgment-debtor is entitled to mesne profits for the subsequent period. We can see no reason why such a claim should not be granted. It is true that the purchaser is not entitled to interest on the money which the decree-holder has to refund. But on the facts of the present case he has only himself to blame for not executing his order and recovering this sum from the decree-holder long ago. His continued possession of the land after his sale has been set aside, is certainly wrongful possession and the judgment-debtor who is entitled to the land can claim mesne profits from the date of the setting aside of the sale, namely, 25th February, 1939. The amount of mesne profits will be

1. (1941) 2 M.L.J. 1060.

ascertained in the lower Court. The appellant is entitled to his costs here and in the Courts below.

K.S. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

Kadali Mangamma and another .. *Appellants** (*Defts.*)

v.

E. P. R. Chettiar Firm, by its agent's power of attorney holder, V. S. N. Murthy .. *Respondent* (*Plff.*).

Limitation Act (*IX of* 1908), *Art.* 123—*"Payable or deliverable"—Commencement of limitation—Direction for payment of legacy free of subsisting mortgage—Discharge of mortgage as starting point—Civil Procedure Code* (*V of* 1908), *section* 11—Res judicata *between co-defendants.*

A will of the year 1909 provided that the executors should pay off the mortgage on a certain property and convey that property to the testator's daughter and further provided that the residue should be given equally to three named persons. The testator died ten days after the will and the mortgage was completely discharged only in 1930. One of the legatees of the residuary estate in the meanwhile sued in 1925 for possession of his share of the residuary estate expressly admitting the validity of the legacy in favour of the testator's daughter. The suit proceeded *ex parte* so far as she was concerned. The other defendants contended however before the Commissioner who was appointed in that suit to divide the estate that the legacy in favour of the testator's daughter had lapsed and that they had acquired title to it by adverse possession. The lower Court accepted the contention and directed division of that legacy between the plaintiff and the other defendants. In 1933 a decree-holder against one of the defendants attached in execution a portion of the lands which formed part of the legacy given to the testator's daughter. The latter then filed an objection to the attachment claiming the properties as hers. The claim was contested and the attachment was eventually removed. Thereupon the attaching decree-holder filed a suit contending that the claimant's right had become barred as she had not enforced her rights under the will within twelve years of the death of the testator and that the decree passed in the suit of 1925 would operate as *res judicata.*

Held, that the suit was not barred by limitation and the legacy had not lapsed because it became 'payable' within the meaning of Art. 123 of the Limitation Act only after the mortgage-debt was completely discharged.

Venkatadri Apparao v. *Parthasarathi Apparao,* (1925) 48 M.L.J. 627: L.R. 52 I.A. 214: I.L.R. 48 Mad. 312 (P.C.), relied on.

Held, further, that the suit was not barred by *res judicata.*

Before the rule of *res judicata* can be applied between co-defendants three conditions have to be fulfilled: there must be a conflict of interest between the defendants concerned; it must be necessary to decide the conflict in order to give the plaintiff the relief claimed by him; and the question between the defendants must have been finally decided.

Munni Bibi v. *Trilokanath,* (1931) 61 M.L.J. 196: L.R. 58 I.A. 158: I.L.R. 53 All. 103 (P.C.), relied on.

Appeal against the decree of the Court of the Subordinate Judge of Amalapuram in O.S. No. 60 of 1939.

P. Somasundaram for Appellants.

V. Viyyanna for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—Several questions of law arise in this appeal but in order to understand them the facts must be examined in detail. On the 10th of April, 1909, Narasayya Chetti, the father of the first appellant, died. He left a will which he had executed four days before and by it he bequeathed to his daughter some 19 acres of agricultural land in the East Godavari District. The land was mortgaged and there was then due to the mortgagee Rs. 15,800. The testator appointed his brother Subbarayadu, his nephew Yerrappa and his grandson Satyanarayana as his executors. The will did not expressly state that they were to be his executors, but there can be no doubt from the wording of the

---

*Appeal No. 294 of 1940. 26th August, 1942.

document that this was his intention. Subbarayadu applied to the Chief Court of Lower Burma for a grant of letters of administration with the will annexed, the testator having left considerable property in Burma. Subbarayadu claimed to be entitled to the grant as an executor and Yerrappa as an executor agreed to the application being granted. The grandson Satyanarayana was then a minor. In due course letters of administration were issued.

The testator directed his executors to pay to the first appellant's husband a sum of Rs. 16,000 to enable him to discharge the mortgage and he further directed that when this had been done they were to convey the property to his daughter. After making certain other bequests the testator directed that the residue of his estate should be divided equally between Subbarayadu, Yerrappa and Satyanarayana. The executors realised that it was their duty to pay off the mortgage on the property left to the first appellant and on the 5th of March, 1917, they executed a promissory note for the amount due to the mortgagee. In the body of the note it was stated that the testator had left a registered will wherein it was provided that the property mortgaged should be given to his daughter and that the amount due to the mortgagee should be paid out of the monies owing to him at Rangoon. The testator had a number of cargo boats in Rangoon and according to the inventory which Subbarayadu filed in the Chief Court of Lower Burma there was due to the testator's estate for the hire of these cargo boats Rs. 21,585. The executors were apparently not able to collect the whole amount immediately and the debts due to the mortgagee were not completely discharged until the 20th August, 1930. From time to time payments to account were made and fresh promissory notes were executed by Subbarayadu as the representative of the estate.

In 1925 Satyanarayana instituted a suit (O.S. No. 31 of 1925) in the Court of the Subordinate Judge of Amalapuram for the administration of the estate and for possession of his one-third share in the residue. In his plaint he expressly admitted the validity of the legacy in favour of the first appellant. The defendants to the suit were Subbarayadu and Yerrappa, the other two executors, and the first appellant, but as the plaintiff conceded that she was entitled to the 19 acres of land she was not called upon to file a written statement and so far as she was concerned the suit proceeded *ex parte*. Subbarayadu and Yerrappa defended it and pleaded that the will was invalid because the whole of the property referred to in it belonged to the joint family. They also pleaded that they had acquired title to the 19 acres left to the first appellant by reason of being in possession adverse to her for more than twelve years. The Subordinate Judge passed a preliminary decree on the 26th of November, 1930. He held that the property which the testator had disposed of by his will represented his self-acquired property and therefore the will was valid. He directed the partition of the estate and ordered the plaintiff to be put in possession of his share. In order to effect an equal division of the estate a Commissioner was appointed. When the matter was before the Commissioner the question was raised whether the legacy to the first appellant should be deemed to have lapsed. No notice was given to the first appellant that this question had been raised and it was disposed of in her absence. The Subordinate Judge held that the legacy had lapsed and the lands had become divisible between the plaintiff and the two contesting defendants.

On the 18th of August, 1933, the respondent obtained a money decree in the Rangoon High Court against Yerrappa, his brother Venkatarao and another person. This decree was transferred to the Court of the Subordinate Judge of Amalapuram for execution and in the month of March, 1934, the decree-holder attached 7·76 acres out of the 19 acres which formed the legacy to the first appellant. The first appellant filed an objection to the attachment on the ground that the property had been left to her by her father. Her objection was accepted and the attachment removed. Thereupon the respondent filed the suit out of which this appeal arises. He contended that as the first appellant had not instituted a suit to enforce her rights under the will within twelve years of the death of the testator she had

lost all right to the property. He also averred that Subbarayadu and Yerrappa had acquired a good title to the land in suit by reason of adverse possession and that the decree passed in O.S. No. 31 of 1925 operated as *res judicata*. The Subordinate Judge accepted these pleas. Accordingly he declared that the 7·76 acres constituted the property of Yerrappa and his brother Venkatarao and therefore could be attached in a decree against Yerrappa. The appeal is from that decision.

It will be convenient to deal with the question of *res judicata* first. The decision on a question which arises between the defendants in a suit may operate as *res judicata* but the Privy Council in *Munni Bibi* v. *Trilokanath*[1] laid it down very clearly that before the rule of *res judicata* can be applied between co-defendants three conditions have to be fulfilled, namely: (1) there must be a conflict of interest between the defendants concerned; (2) it must be necessary to decide the conflict in order to give the plaintiff the relief claimed by him; and (3) the question between the defendants must have been finally decided. Now in this case the plaintiff admitted the first defendant's right to the 19 acres and she was not concerned with his claim to a one-third share in the residue of the estate. That was a matter between him and his co-executor. It was not necessary to decide whether the legacy had lapsed in order to give the plaintiff the relief which he claimed. Therefore, the second of the three conditions laid down by the Privy Council is not fulfilled in this case, and the doctrine of *res judicata* cannot be applied. In the circumstances it is not necessary to decide whether the third condition laid down by the Privy Council is also unfulfilled.

We will now turn to the question whether the first appellant's legacy must be deemed to have lapsed. The finding of the Subordinate Judge that it had lapsed was based on Article 123 of the Limitation Act. That fixes a period of twelve years for the institution of a suit to enforce a legacy and the time begins to run when the legacy becomes "payable or deliverable." The construction to be placed upon this article was considered by the Judicial Committee in *Venkatadri Apparao* v. *Parthasarathi Apparao*[2]. There suits were instituted in 1916 to recover the legacies bequeathed by a testatrix who had died in 1889. The will provided that the legacies were to be paid out of a fund in Court. The fund could only come under the control of the testatrix if and when a suit which she had brought was successful. The suit was pending until the death of the testatrix and was continued by her legal representatives. The case was decided against the legal representatives in the trial Court and in this Court, but on appeal to the Privy Council it was decreed. The decision of the Privy Council was given in 1913. The suits which were instituted to recover the legacies were filed 17 years after the death of the testatrix, but within three years of the decision of the Privy Council. The Judicial Committee held that they had been instituted in time. In the course of the judgment the Board said,

"The question as to what the word 'payable' means is not without difficulty. It has been contended on the part of the appellants that the legacies sued for became payable at the latest twelve months after the death of Venkayyamma, in which case the suits would be barred by limitation. Looking at Art. 123 as one of general application to such suits, it appears to their Lordships that a similar interpretation must be given to the words 'payable' and 'deliverable' as used in the article, and that a share in the property of an intestate would not be 'deliverable', until the administrator, to whom letters of administration had been granted, had in his hands the share to be delivered, and, similarly, a legacy or share in a legacy does not become 'payable' until the executor or other person liable to pay it has in his hands money with which it could be paid."

We have already pointed out that the land left to the first appellant was subject to two mortgages and that the executors were directed to pay them off. Until they did so the land could not be declared to the first appellant free of the mortgages which was the testator's direction. If the executors had not the money in hand to discharge the mortgages the legatee could not compel them to do so and until they were in a position to redeem the legacy was not deliverable to her. It

---

1. (1931) 61 M.L.J. 196: L.R. 58 I.A. 158: I.L.R. 53 All. 103 (P.C.).

2. (1925) 48 M.L.J. 627: L.R. 52 I.A. 214: I.L.R. 48 Mad. 312 (P.C.).

seems to us that the decision in *Venkatadri Apparao* v. *Parthasarathi Apparao*[1] has direct application here. Accordingly we hold that when Satyanarayana brought his suit in 1925 the legacy to the first appellant had not lapsed, the mortgages not having been paid off. They were not paid off until the 26th of November, 1930, and therefore the first appellant had twelve years from that date in which to enforce the delivery of the lands to her.

We consider that the Subordinate Judge also erred in holding that Subbarayadu and Yerrappa had acquired title by adverse possession. He appears to have been impressed by the fact that on the 15th of November, 1911, 4th of October, 1916 and on the 9th of February, 1925, Subbarayadu granted leases of this land. The fact that he did so does not imply any claim adverse to the first appellant. He had obtained letters of administration and until he was in a position to deliver to the first appellant the 19 acres free of the mortgage it was his duty to let out the lands for the benefit of the estate. There is no evidence whatsoever of a claim adverse to the first appellant having been made by either Subbarayadu or Yerrappa until the time when they filed their written statements in the suit instituted against them by Satyanarayana.

The appeal will be allowed with costs here and in the Court below. Our findings also dispose of the memorandum of cross-objections filed by the respondent. This will likewise be dismissed with costs.

B.V.V. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Yarlagadda Abbayi *alias* Veeranna and another .. *Petitioners** (*Respts.*)

v.

The Official Receiver, East Godavari at Rajahmundry .. *Respondent* (*Petr.*).

Provincial Insolvency Act (V of 1920), sections 53, 4 and 75—Application asking for relief under section 53 linked with one under section 4—No second appeal lies.

Where an application made by the Official Receiver for setting aside a partition decree passed in a suit brought against a Hindu father before he was adjudicated insolvent, on the ground that it had been fraudulently and collusively obtained was dismissed by the trial Court but on appeal the District Judge held the opposite view and set aside the partition decree no second appeal lies from the order of the District Court though in the original application a relief under section 4 had been linked with one under section 53. Only decisions under section 4 can be the subject of second appeals.

Petition under section 75 of the Provincial Insolvency Act V of 1920, praying that the High Court will be pleased to revise the order of the District Court of East Godavari at Rajahmundry, dated 2nd July, 1940, and made in C.M.A. No. 78 of 1939, preferred against the order of the Court of the Subordinate Judge of Coconada in I.A. No. 74 of 1938 in I.P. No. 35 of 1933.

P. V. Vallabacharyulu for Petitioners.

M. S. Ramachandra Rao for Respondent.

The Court delivered the following

JUDGMENT.—On the 7th September, 1932, the appellants filed a partition suit against their father. Subsequently, he was adjudged an insolvent on an insolvency petition filed by a creditor on the 26th June, 1933. On the 1st August, 1933, a preliminary partition decree was passed in the partition suit; and on the 21st September, 1934, the decree became final. The Official Receiver thereupon filed an application under section 53 of the Provincial Insolvency Act to set aside the partition decree on the ground that it was fraudulent and collusive. His application was also under section 4 of the Act, in that he asked in the alternative that the partition which was grossly unfair and intended to screen as much property as possible from the creditors might be re-opened. The application was dismissed.

---

1. (1925) 48 M.L.J. 627: L.R. 52 I.A. 214: I.L.R. 48 Mad. 312 (P.C.).

*A.A.A.O. No. 157 of 1941 12th November, 1942.
(Converted into C.R.P. No. 1574 of 1942).

In appeal, the learned District Judge held the opposite view; and finding that the suit was a collusive one, he set it aside under section 53 of the Act. He did not find it necessary to give any finding on the other point, which would have arisen only in case the Official Receiver failed on the main point.

The learned advocate for the Official Receiver has raised a preliminary point that no appeal lies. Section 75 (1) makes the order of the District Court final except that a person "aggrieved by a decision of the District Court on appeal from a decision of a Subordinate Court under section 4 may appeal to the High Court on any of the grounds mentioned in sub-section (1) of section 100 of the Civil Procedure Code." The application in this case was one under section 4 as well as under section 53; and it is possible to say that the appellants were aggrieved by the decision of the District Court on appeal from the decision of the Subordinate Court under section 4. But if that interpretation were given to the proviso, it would mean that the first "decision" in that proviso might be with regard to a point altogether different from that which is the subject of the other decision. It hardly seems possible that the Legislature could have intended that the two decisions referred to in the proviso should be on entirely different points and that a decision of the District Court on some matter that had nothing to do with section 4 should be appealable because in the original application a relief under section 4 had been linked with one under section 53. It seems reasonable to suppose that the Legislature intended that only decisions under section 4 should be the subject of second appeals. I therefore hold that no second appeal lies. As this appeal may be said to involve a question of law, I convert it into a civil revision petition.

One of the points in dispute before the District Judge was whether a fraudulent and collusive decree can be set aside under section 53; but it is conceded in this Court that it can. As to whether the partition effected by the suit was fraudulent and collusive or not is a question of fact. The learned District Judge has given very cogent reasons—in paragraph 6 of his judgment in particular—why he feels sure that the object of this suit was to screen property from the creditors. I have seen the judgment in the partition suit. Although the father put in a written statement saying that the debts were not incurred for illegal or immoral purposes, he seems to have contested the suit no further. The case is discussed in three short sentences. They run:

"The only objection is as regards the C Schedule which consists of utensils and other household articles. They are in the house and are divisible. There cannot under the circumstances be any objection to the partition."

The father said nothing of the many debts due, presumably in order that his sons might get two-thirds of the property free from liabilities. It is therefore clear that the father and the sons did join together in order to screen family property from the creditors.

I agree with the learned advocate for the appellants that it does not necessarily follow that because the father and the sons colluded to screen as much property as possible from the creditors that they did not intend to effect a division in status; but that question too is one of fact that was not raised clearly by the appellants in the Courts below. It however seems pretty clear that the learned District Judge was definitely of opinion that the suit was brought not for the purpose of effecting a partition, whether of status or of property; but for the sole purpose of screening the property from the creditors. I am not prepared to say that there was any desire on the part of minors or those who represented them to effect a division in status between them and their father.

The revision petition is dismissed with costs.

K.S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

V. Swarnam Aiyar .. *Petitioner** (*Defts.*)

v.

Veeragu Ammal .. *Respondent* (*Plff.*).

Civil Procedure Code (V of 1908), Order 13, rule 1—Small cause suit—"First hearing" for filing documents—What is.

Section 35-A—Award of compensatory costs—Principles.

In a small cause suit the date of the first hearing is not the date on which the written statement is filed but the date which the Court appoints for the trial to begin after the pleadings have been completed. Hence documentary evidence tendered in support of a plea in the written statement on the day of the hearing should not be rejected on the ground that such documents were not filed along with the written statement.

In the absence of an objection raised on behalf of the plaintiff that the defence was false or vexatious to the knowledge of the defendant, the Court has no power to award compensatory costs under section 35-A of the Civil Procedure Code. Moreover an order under the section has to be passed after recording reasons for holding the defence to be false or vexatious. Merely saying "Having regard to the contentions raised, I think that this is a case in which the plaintiff is entitled to some compensation" is not a sufficient recording of reasons for holding the defence to be false or vexatious to the knowledge of the defendant.

Petition under section 25 of Act IX of 1887, praying that the High Court will be pleased to revise the decree of the Court of the Subordinate Judge of Devakottai, dated 17th September, 1940, and passed in S.C.S. No. 93 of 1940.

A. V. Narayanaswami Aiyar for Petitioner.

G. N. Chari for Respondent.

The Court delivered the following

JUDGMENT.—The petitioner was the defendant in a suit on a promissory note. He took various contentions of which the most substantial were a plea of limitation and a plea that he was entitled to the benefits of Act IV of 1938. The plea of limitation failed rightly, being based on a misunderstanding of the effect of a Privy Council ruling. It seems to me quite clear that the last endorsement, dated 19th July, 1937, is an acknowledgment saving limitation and made on the date which it bears.

The plea under Act IV of 1938 also did not find favour with the learned Subordinate Judge. The plaintiff in his plaint asserted that the defendant was not an agriculturist but did not set up any specific exclusion from the category of agriculturists under the provisos to section 3 of Act IV of 1938. The written statement alleged that the defendant was an agriculturist entitled to the benefits of the Act, but did not plead how precisely the defendant was qualified as an agriculturist. The written statement was filed on the 26th of August, 1940 and the case was posted for hearing to 16th September on which date the evidence was recorded. On the 16th when the defendant gave his evidence it would appear—though there is no positive record of this fact—that the defendant's vakil wished to tender documentary evidence that the defendant owned particular lands and that these documents were excluded on the ground that they ought to have been filed with the written statement. That is the assertion of the petitioner here and the information received from the gentleman who appeared for the respondent in the lower Court seems to support this version. The evidence of the defendant himself is to the effect that he owned lands in specified villages and that some of those properties were in his enjoyment and others in the enjoyment of his partner and that he was paying kist in respect of that. There was practically no cross-examination except a question as to why particulars of these lands were not stated in the pleading. And there is no positive evidence that the defendant does not own lands.

In this state of the evidence the learned Subordinate Judge found that the defendant was at fault in not pleading the details of his qualification as an agricul-

*C.R.P. No. 708 of 1941. 15th July, 1942.

turist in his written statement and that the oral evidence to the effect that he owned lands was too vague to be acted upon. He therefore declined to give the defendant the benefit of the Act and not only did he do so but he concluded his judgment by saying,

"Having regard to the contentions raised, I think that this is a case in which plaintiff is entitled to some compensation under section 35-A of the Civil Procedure Code."

Plaintiff is therefore given Rs. 30 in addition to the costs of the suit.

If in fact the lower Court held the view that in a small cause suit it is incumbent upon a defendant to file along with the written statement every scrap of paper on which he proposes to rely by way of evidence, I can find no support in law for this view. Order 13, rule 1, Civil Procedure Code, requires the parties or their pleaders to produce at the first hearing of the suit, all the documentary evidence on which they intend to rely. It has been held with reference to the trial of an ordinary suit that the first hearing of the suit is the hearing for the framing of issues —vide *Chidambaram* v. *Parvathi*[1]. That occasion is of course the first occasion on which parties or their pleaders are normally heard. In a small cause suit, the normal practice is for the written statement to be filed without any hearing of the parties and for a date then to be fixed on which the trial shall proceed, there being no framing of issues. It seems to me impossible to hold that the date on which the defendant files his written statement is the date of the first hearing. In a small cause suit the date of the first hearing must be the date which the Court appoints for the trial to begin after the pleadings have been completed. If this view is correct, it follows that the documentary evidence available to the defendant in support of his plea that he was an agriculturist should not be rejected if tendered on the day of the hearing. No doubt he might in his written statement have given some particulars of his qualifications to be an agriculturist; but his omission to do so is not to my mind a ground for refusing to admit his evidence, though it might have been a ground for requiring him to amplify his pleading. Even without the documentary evidence, it might well have been held by the trial Court that the only evidence on the subject of the agriculturist status of the defendant was that which the defendant himself adduced which was to the effect that he did own agricultural lands. But clearly the documentary evidence which the defendant tendered should not have been excluded if the lower Court was not satisfied with the oral evidence which he adduced.

The order of the trial Court under section 35-A of the Civil Procedure Code seems to me to be open to criticism both on technical grounds and on the merits. It does not appear that any objection was raised on behalf of the plaintiff to the effect that the defence was false or vexatious to the knowledge of the defendant and in the absence of any such objection, I do not think that the Court has the power to award compensatory costs under section 35-A. Moreover an order under section 35-A has to be passed after recording reasons for holding the defence to be false or vexatious. In my opinion the words "having regard to the contention raised, I think that this is a case in which the plaintiff is entitled to some compensation" are not a sufficient recording of the reasons for holding the defence to be false or vexatious to the knowledge of the defendant. As I read the defence, there is nothing false or vexatious in it. Certain pleas have been taken which have failed. One plea has been taken which there are grounds for thinking should have succeeded. But whether it succeeds or fails, there is nothing to show that it was taken falsely or vexatiously. It failed not because it was false but because it was not sufficiently proved.

In the result therefore I allow the revision petition with costs, set aside the decree and order of the lower Court and direct the lower Court to record a fresh finding on the question whether the defendant is entitled to the benefits of Act IV of 1938 after permitting both parties to adduce evidence on this question. The

1. A.I.R. 1926 Mad. 347.

lower Court will then pass a fresh decree in the light of the finding and of this Court's judgment.

K.S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUPPUSWAMI AYYAR.

Thirumalareddi Inna Reddi and another .. *Appellants**

v.

Gade Gopireddi and another .. *Respondents.*

Transfer of Property Act (IV of 1882), section 106—Lease—Agricultural lands—Presumption—Suit for ejectment—Lessor found entitled to both warams—No need for lessor to prove terminable character of tenancy—Well dug by tenant—Not such an improvement as to entitle him to claim compensation.

In the absence of any contract or usage to the contrary Courts will have to presume in the case of agricultural lands that the lease is from year to year if there is nothing to show how the tenancy started. When it is found that the lessors are the owners of both the *melwaram* and *kudiwaram* in the lands it is sufficient to entitle the lessors to eject the tenants without further proving the terminable character of the tenancy.

Lakshmana Reddiar v. *Sri Subramaniaswami,* (1938) 1 M.L.J. 634: I.L.R. (1938) Mad. 888 and *Subbarayudu* v. *Narasimha Rao,* (1924) 47 M.L.J. 558, considered.

Where a tenancy is from year to year the tenants are not entitled to any compensation for improvements. In any event the digging of a well by a tenant will be for his own benefit and it is not an improvement of such a character as to entitle the tenant to compensation.

Venkatavaragappa v. *Thirumalai,* (1886) I.L.R. 10 Mad. 112, applied.

Appeal against the decree of the Court of the Subordinate Judge of Guntur in A.S. No. 41 of 1939, preferred against the decree of the Court of the District Munsiff of Gurzalla in O.S. No. 240 of 1937.

S. T. Srinivasagopalachari for Appellants.

P. Chandra Reddi for Respondents.

The Court delivered the following

JUDGMENT.—The appellants in both these appeals are the defendants and the two appeals arise out of two suits in ejectment and for possession of the suit lands, filed by the trustees of the Venugopalaswami temple at Rentachintala. That the defendants are tenants holding the lands was not disputed but their case was that the temple had only the melwaram interest in the lands and that they had permanent rights of occupancy, that they were in occupation from time immemorial, that their predecessors alienated the lands and made improvements, that they have been paying a uniform rate of rent, Rs. 10, in one case and Rs. 15 in another, which was not in keeping with the current rate of rent and that the plaintiffs had no right to eject them. The first Court found that the temple had only the melwaram interest and that the defendants had permanent rights of occupancy and dismissed the suits. On appeal the learned Subordinate Judge held that the temple was entitled to both the warams and that the defendants had no permanent rights of occupancy and decreed the suits. He, however, gave the defendants compensation for improvements which consisted in the digging of a well. The defendants have appealed against the decrees in ejectment and the plaintiffs have filed cross-objections against the decree granting compensation for improvement.

So far as the findings of the lower appellate Court that the temple had both the warams and that the defendants had no permanent rights of occupancy are concerned they are findings of fact binding on this Court and I will not be justified in interfering with those findings which are based on evidence. In arriving at those findings the learned Subordinate Judge has not adverted to any irrelevant evidence and there is nothing to show that he has not correctly considered the question of onus of proof.

It is urged for the appellants that as in all suits for ejectment by a lessor against the lessee the burden is on the lessor to prove that the lease was a termi-

*S.A. Nos. 1022 and 1023 of 1941. 20th July, 1942.

-nable one and it has been so terminated and the lessor is entitled to possession, the mere finding of the lower appellate Court that the temple was entitled to both the warams would not by itself be sufficient to entitle the plaintiffs to eject the appellants without proving the terminable character of the tenancy. This is pointed out in *Lakshmana Reddiar* v. *Sri Subramaniaswami*[1], by His Lordship Justice Venkataramana Rao, after discussing in full the case-law on the point. It is urged therefore that without a finding that the tenancy was terminable the lower appellate Court was not justified in granting a decree for ejectment. But then it must be remembered that neither in *Lakshmana Reddiar* v. *Sri Subramaniaswami*[1], nor in any of the cases referred to with approval therein were the permanent rights of occupancy found against the tenants and decree in ejectment was refused. My attention is drawn to the following observations of His Lordship Justice Spencer in *Subbarayudu* v. *Narasimha Rao*[2],

"In order to prove a right to eject, he must necessarily show that the tenancy is a terminable one and has been validly terminated. This onus is unaffected by any defence of permanent rights of occupancy that the defendant may set up but fails to prove. The principle that in a suit for ejectment the plaintiff must first prove his right to eject before the onus is shifted to the defendant to prove that he has a permanent right of occupancy has been recently affirmed in *Venkatarangayya Appa Rao Bahadur* v. *Marampudi Bajiraju*[3], which was like this a case of resumption of a service inam."

But the observations of His Lordship were made with reference to the facts of that case. Both of them were cases of a zamindar suing in ejectment after resumption of a service inam. That is why it was pointed that in such a suit the plaintiff must prove his right to eject and in order to prove a right to eject he must necessarily show that the tenancy was a terminable one and had been validly terminated. In this case, as already pointed out, both the warams were found to be in the temple. There is absolutely no evidence as to when the appellants' tenancy commenced. At any rate there is no evidence that before the inam grant to the temple the appellants' predecessors-in-title were in possession and that the appellants derive their right from any person who was the tenant before the date of the grant. All the evidence that was let in was that there had been alienations of the property in the shape of execution of wills and sales in respect of his holding, that the rent paid was a uniform rate of rent not in keeping with the current rate of rent and that the appellants have been in possession for a long time. But then in this case as pointed out by the learned Subordinate Judge the appellants could not have acquired permanent rights of occupancy from the temple authorities by any grant or by prescription and it is therefore not possible to presume that there was a lost grant by the temple. It is urged however that this may be a grant by the person in enjoyment of the land before the grant to the temple. For this there must be some basis. In the absence of any evidence to show that the predecessors-in-title of the appellants were in possession before the grant the Court was justified in holding, from the fact that the temple had been granted both the warams, that the appellants have not proved that they had permanent rights of occupancy. Under section 106 of the Transfer of Property Act in the absence of any contract or usage to the contrary Courts will have to presume in the case of agricultural lands that the lease was from year to year if there is nothing to show how the tenancy started. There is absolutely no evidence to show when the tenancy started, and when there is a finding that the tenants have not got permanent rights of occupancy it will have to be presumed that the tenancy was from year to year, and that the plaintiffs have established their right to eject as proper notice has been given to the tenants to vacate the holding.

With regard to the cross-objections in view of the finding that the appellants were only tenants from year to year, it is clear that they are not entitled to any compensation for the improvements. The learned Subordinate Judge has found that they are entitled to compensation as the temple was standing by and allowed

---

1. (1938) 1 M.L.J. 634: I.L.R. (1938) Mad. 888.
2. (1924) 47 M.L.J. 558 at 561.
3. (1923) 45 M.L.J. 238.

the tenants to dig the well. I am not able to see how it can be said that the temple was standing by and allowed them to dig the well. In most cases the tenants are allowed to continue if they are regular in paying the rent and they do not give any trouble to the landlords; and when a tenant who, although in law has no right to continue for more than a year, is still confident that the landlord will allow him to continue longer and makes some improvement to the land by digging a well, he does so because the improvement will be for his benefit. Further in *Venkatavaragappa* v. *Thirumalai*[1], it has been pointed that the digging of a well was not an improvement of such a character as to entitle the lessee to claim compensation for improvement under Hindu Law. I therefore find that the learned Subordinate Judge was not justified in granting compensation to the appellants for improvement.

In the result both the second appeals are dismissed with costs. The cross-objections are allowed and the decree directing the plaintiffs to pay compensation before eviction is set aside. The appellants will pay the court-fee paid on the cross-objections as costs in them. Leave refused.

K.S. *Appeals dismissed and cross-objections allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PATANJALI SASTRI.

U. Muthuramalinga Thevar .. *Petitioner** (*Petr.-Deft.*)

v.

R. Shanmuga Rajeswara Naganatha Sethupathy Avl., Rajah of Ramnad, through his next friend, Sri L. R. Venkataraman, Estate Manager at Ramnad .. *Respondent* (*Respt.-Plff.*).

Madras Agriculturists' Relief Act (IV of 1938), *section* 15—*Application under—If subject to the time-limit specified in section* 20.

Although a procedure analogous to that laid down in section 19 of Madras Act IV of 1938 should be followed with reference to decrees for rent which do not strictly fall within that provision the time-limit specified in section 20 of the Act is not applicable to applications for relief under section 15 of the Act.

Petition under section 25 of Act IX of 1887, praying that the High Court will be pleased to revise the order of the Court of the District Munsiff of Paramakudi, dated 29th July, 1941, and made in I.A. No. 7 of 1941 in S.C. No. 341 of 1925.

S. Venkatesan for Petitioner.

Respondent not represented.

The Court delivered the following

JUDGMENT.—In this case the Court below has dismissed an application for relief under section 15 of Act IV of 1938 filed by the petitioner against whom a decree had been passed for poruppu payable to the respondent. The ground of dismissal was that the application was barred by limitation. The Court relied on the decision in *Venkata Rajagopala Krishna Yachendra Bahadur Varu* v. *Venkataseshacharlu*[2] in support of this conclusion. That decision no doubt holds that a procedure analogous to that laid down in section 19 should be followed with reference to decrees for rent which do not strictly fall within that provision. This does not however mean that in dealing with applications of this kind, the Court ought to apply the time-limit specified in section 20 of the Act which in terms applies only to applications for relief under section 19. It is one thing to say that the Act having indicated no appropriate procedure for scaling down decrees for rent as provided by section 15 of the Act a procedure analogous to that provided in section 19 for decrees for the repayment of "debts" (which term does not include rent) should be followed, but it is a different thing to hold that the time-limit prescribed in section 20 should be applied to applications for relief under section 15 in respect of

---

1. (1886) I.L.R. 10 Mad. 112.

*C.R.P. No. 2330 of 1941. 27th November, 1942.

2. (1941) 2 M.L.J. 655.

decrees for rent; for this would be enacting a new rule of limitation based upon analogy which the Court, in my opinion, has no power to do.

The order of the Court below is set aside and the case is remanded for disposal according to law. Costs will abide and follow the result.

K.S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(*Ordinary Original Civil Jurisdiction.*)

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

The Commissioner of Income-tax, Madras .. *Petitioner**

v.

The Madras Provincial Co-operative Bank, Limited .. *Respondent.*

Income-tax Act (XI of 1922) as amended in 1939—Section 8, provisos 1 and 2—Scope and applicability.

In the year of account 1938-39 the assessee a society registered under the Co-operative Societies Act received in interest on tax-free securities the sum of Rs. 69,975 which could be deducted under proviso 2 to section 8 of the Income-tax Act when calculating the taxable income. It was claimed by the assessee that by virtue of proviso 1 to section 8 a further deduction of Rs. 26,729 being the interest which was paid in the year of account on monies borrowed for the purpose of buying tax-free securities, should be allowed.

Held: (1) The assessee is not entitled to double exemption in respect of the tax-free securities. The assessee was entitled to the benefit of the first proviso in respect of interest received from securities which are not tax-free and to the benefit of the second proviso in respect of tax-free securities.

(2) The interest paid on debentures of the Madras Co-operative Central Land Mortgage Bank bought by the assessee in the open market as investment represents taxable income.

Case stated under section 66 (2) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Madras.

K. V. Sesha Aiyangar assisted by *K. S. Srinivasan* for Petitioner.

P. Satyanarayana Rao for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—The first question referred involves the construction of section 8 of the Indian Income-tax Act, 1922, as amended in 1939. The first clause of the section states that the tax shall be payable by an assessee under the head "Interest on securities" in respect of the interest receivable by him on any security of the Central Government or of a Provincial Government, or on debentures or other securities for money issued by or on behalf of a local authority or a company. Then follow three provisos. The first proviso allows the assessee to deduct the interest payable by him on money borrowed for the purpose of investment in securities. In other words, the tax is only payable on the amount of interest received, less the interest which the assessee has to pay as the result of having borrowed to make the investment. The second proviso says that no income-tax shall be payable on the interest receivable on a security of the Central Government issued or declared to be income-tax free. The third proviso makes a similar provision in respect of a security of a Provincial Government issued income-tax free, but in that case the tax is payable by the Provincial Government.

The assessee here is the Madras Provincial Co-operative Bank, Limited, a society registered under the Co-operative Societies Act, 1912, and the Madras Co-operative Societies Act, 1932. In the year of account, 1938-39, the assessee received in interest on tax-free securities the sum of Rs. 69,975. By reason of the second proviso to section 8 the assessee is entitled to deduct this sum when calculating the amount of income on which income-tax is payable. The exemption does not apply in respect of super-tax. Section 16 (1) (*a*) states that in computing the total income of an assessee any sums exempted under the second and third provisos to section 8 shall be included.

---

*O.P. No. 114 of 1942. 28th September, 1942.

The assessee is not content with the deduction of the Rs. 69,975. It is said that the Income-tax Officer should, by virtue of the first proviso to section 8, allow a further deduction of Rs. 26,729 being the interest which was paid in the year of account on monies borrowed for the purpose of buying tax-free securities. The second proviso was always in the section. The first proviso was inserted in 1939 and there can be no doubt that the object which the Legislature had in mind was to exempt to this extent interest received on securities which were taxable. In our opinion, the assessee here is entitled to the benefit of the first proviso in respect of interest received from securities which are not tax-free and to the benefit of the second proviso in respect of tax-free securities. The assessee is not entitled to a double exemption in respect of the tax-free securities. The question will be answered in this sense.

The second question must also be answered in favour of the Income-tax authorities. The assessee has invested money in debentures issued by the Madras Co-operative Central Land Mortgage Bank. These debentures were bought by the assessee in the open market. The contention is that the monies paid for these debentures represent loans to the Madras Co-operative Central Land Mortgage Bank and therefore represent transactions which are part of the ordinary business of the assessee. Clause 12 (2) of the by-laws of the assessee says that loans may be granted by the executive committee to registered societies as defined by the Madras Co-operative Societies Act, 1932, other than Central Banks in the Province, on such terms and conditions as the executive committee may prescribe from time to time and with the general or special sanction of the Registrar, under section 32 of the Madras Co-operative Societies Act, 1932. There was no sanction asked for or given here and therefore there was no loan to the Madras Co-operative Central Land Mortgage Bank within the meaning of the by-laws. But apart from this, the fact that the assessee went into the market to purchase these securities shows that the object was investment. The interest paid on these debentures represents taxable income. Consequently the answer to the second question is that the interest on the debentures represents interest on an investment.

The Commissioner of Income-tax is entitled to his costs, which we fix at Rs. 250.

K.S. — *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SOMAYYA.

G. Sreenivasa Chettiar by power of attorney agent, Sundar Rajulu .. *Appellant** *(Plaintiff)*

v.

Ramaru Goundar and others .. *Respondents (Defts.).*

Water—Right to take—Dry lands in estate—Surplus water taken for irrigation—Right whether conferred by such user—Punja mel nanja—Meaning and incidents.

The term *"punja tharam nanja"* which is very commonly employed in the Salem, North Arcot and Chittoor Districts means no more than a land to which water may be allowed by the proprietor of the village if the wet ayacutdars had enough water for their needs in respect of their irrigable areas. Even if the owners of the dry lands had been taking the tank or channel water for several years continuously for the dry lands and the proprietor did not object to it, it must be taken that there was enough surplus water in those years and the owners of those dry fields cannot claim that they acquired a right by prescription against the proprietor himself or against the wet ayacutdars. Such user is not as of right and even by long user it cannot be claimed by the owners of the dry fields either as against the proprietor or against the inamdar. *Punja tharam nanja* or *punja mel nanja* are no more than mere dry lands liable to pay ordinarily a dry assessment and liable to pay an additional amount in the event of the dry field being cultivated with a wet crop, there being surplus water not needed by the wet ayacutdars.

Appeal against the decree of the District Court of Salem in A.S. No. 202 of 1940 preferred against the decree of the Court of the District Munsiff of Krishnagiri in O.S. No. 150 of 1938.

*S.A. No. 1016 of 1941. 16th July, 1942.

D. Ramaswami Aiyangar for Appellant.

K. S. Champakesa Aiyangar and *K. C. Srinivasan* for Respondents.

The Court delivered the following

JUDGMENT.—This is an appeal preferred by the plaintiff who is the landholder of the village of Nedungal in the Salem district against the decree of the District Judge of Salem in so far as it refused to the plaintiff landholder certain reliefs. The defendants are the ryots holding certain lands in this village which are classified as dry. There is a channel marked A-B-C in the plaint sketch which is a feeder channel to the Nedungal tank and it branches from the river South Pennar. Both the tank and the channel are sources of irrigation to the ayacut nanja lands, *i.e.*, the wet lands in the village. The defendants who are the owners of certain dry lands in the village claim to take water from the channel by means of certain baling stands shown in the plaint sketch. They are also mentioned as 1 to 5 in the Commissioner's sketch. The plaintiff as the proprietor of the village claimed a right to regulate the supply of water from the village tank and the supply channel which are both sources of irrigation for the wet ayacut of the village. He wanted an injunction preventing the defendants from using the water of the channel for their dry lands. The plea put forward by the defendants which has found acceptance with the lower Courts is that the defendants are entitled to have their dry lands irrigated with the water of the said channel by means of baling stands as the baling stands were ancient ones and not new ones. The defendants say that they have been baling water by using the said baling stands without any obstruction or hindrance from the proprietor and that they were taking water not only for their dry lands mentioned in the plaint but also for all their other dry lands situated in the locality.

The question is whether the owners of dry lands in a village are entitled to claim a right of taking water from a tank or a channel which is the admitted source of irrigation for the wet fields in the village. The very classification of lands as "dry" and "wet" shows that the dry lands are not ordinarily at any rate entitled to claim the water from the village tank or from the supply channel or from any other source in the village for their dry lands. These sources of supply—whether it be the tank or the channel—are intended primarily, at any rate, to supply the needs of the wet ayacutdars and as it is well known the wet ayacut under each tank or channel was fixed with reference to the capacity of the tank or the channel to supply enough water for a particular area. That being the way in which the irrigable area was fixed, it goes without saying that even the proprietor who owns these sources as the owner of the entire village, is not entitled to divert the water from these sources of supply to the detriment of the wet ayacutdars or to allow any other person the use of that water for his dry lands. Of course, if after supplying the needs of the wet ayacutdars with respect to the irrigable area there is surplus water, the proprietor may instead of allowing the water to go waste, allow that excess water being used by the owner of a dry field. But beyond this, the proprietor himself has no right. The term *"punja tharam nanja"* which is very commonly employed in Salem, North Arcot and Chittoor Districts means no more than a land to which water may be allowed by the proprietor in the circumstances mentioned above, *i.e.*, if the wet ayacutdars have had enough for their needs in respect of their irrigable area. Even if the owners of the dry lands had been taking the tank or channel water for several years continuously for the dry lands and the proprietor did not object to it; it must be taken that there was enough surplus water in those years and the owners of those dry fields cannot claim that they acquired a right by prescription against the proprietor himself or against the wet ayacutdars. Such user is not as of right and even by long user it cannot be claimed by the owners of the dry fields either as against the proprietor or against the inamdar. *Punja tharam nanja* or *punja mel nanja* are no more than mere dry fields liable to pay ordinarily a dry assessment and are liable to pay an additional amount in the event of the dry field being cultivated with a wet crop, there being

surplus water not needed by the wet ayacutdars. I cannot accept the contention that the owners of these dry fields can insist upon being allowed to take water to their dry fields as of right and against the wishes of the proprietor. At any rate, when the drawing of the water by the owners of the dry fields is likely to injure the wet ayacutdars, it goes without saying that there can be no such right recognised in the owners of the dry fields. In the particular case before me there is a distinct allegation in the plaint that the act of the defendants in taking water through the baling stands to the dry fields injuriously affected the rights of the wet ayacutdars. This averment is not denied at all in the written statement. All that is said is that these baling stands are not new ones but that they were ancient ones. Even if they were in existence for a long time, it does not mean that the tenants were taking as of right any water through those baling stands year after year to the dry fields, Mr. Champakesa Aiyangar asks me to say that it was not necessary to deny that averment in the plaint that the acts of the defendants in taking water to the dry fields through the baling stands in question affected the rights of the wet ayacutdars. But I cannot agree with him. There is the distinct averment in the plaint that the action of the defendants would and did in fact affect the rights of the wet ayacutdars and it was necessary to deny this averment and that plaint averment not having been denied, we must take it that there was no necessity to prove that allegation. We must take it that the act of the defendants did or would injuriously affect the rights of the wet ayacutdars. If so, there is no possibility of saying that they are entitled to do it as of right and they cannot acquire such a right as against the Zamindar or the proprietor to such user even if they had been taking water through the baling stands continuously for a number of years with or without the express permission of the landholder. We must take it that in the years in which water was taken to the dry fields there was or every one thought that there would be more water than what was needed for the wet ayacut and in such a case where water was taken to a dry field, it is a case of implied permission (where there is no express permission) and the user is not "as of right".

I reverse the decrees of the lower Courts which denied the relief of injunction against the defendants and I pass a decree restraining the defendants from taking water of the suit channel to their dry fields through the baling stands in question or by any other means.

If the defendants are the owners of any portions of the wet ayacut of the village, of course, they will, as the wet ayacutdars of an irrigable area, under the tank or channel, be entitled to take water along with the other ayacutdars of this village and this injunction which I grant in this decree will be confined to the dry lands (*viz.*, punja or punja-tharam-nanja or punja-mel-nanja) in their holdings. The plaintiff will have his costs throughout from the defendants.

B.V.V. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

G. Abdul Khader Sahib .. *Petitioner** (*Deft.*)

v.

G. Chinniah Naidu .. *Respondent* (*Plff.*).

Civil Procedure Code (V of 1908), Order 21, rule 4—Decree of High Court—Decree for Rs. 5,000 whether executable by Presidency Small Causes Court—Provision in Original Side Rules, Order 19, rule 30—Whether abrogates important provision of Civil Procedure Code.

The Presidency Small Causes Court has no jurisdiction to execute a decree transferred to it from the Original Side of the High Court unless it satisfies the provisions of Order 21, rule 4, Civil Procedure Code. That rule enables the Court of Small Causes to execute decrees of other Courts only when *two* conditions are fulfilled : (1) the decree must have been passed in a suit in which the value set forth in the plaint does not exceed Rs. 2,000 and (2) the suit as regards the subject-matter must not be excepted by the law for the time being in force from the cognizance of either a Presidency or a Provincial Court of Small Causes.

*C.R.P. No. 1108 of 1941. 2nd November, 1942.

Where a decree of the High Court for Rs. 5,000 was transferred to the Presidency Small Causes Court, Madras, for the purpose of executing it for about Rs. 600 against money lying to the credit of the defendant with the latter Court,

Held, (1) that the Presidency Small Causes Court had no jurisdiction to execute the decree.

(2) That rule 30 of Order 19 of the Original Side Rules was not intended to overrule such an important provision as Order 21, rule 4 of the Civil Procedure Code. Any marked deviation from the Code of Civil Procedure should be positively expressed and not left to be deduced by inference.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of Small Causes at Madras, dated 4th February, 1941 and made in M.P. No. 122 of 1941 in E. P. No. 240 of 1941 in C. S. No. 302 of 1932.

P. K. Janakiraman and *S. Krishnamachari* for Petitioner.

P. G. Krishna Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—The respondent held a decree in this Court for Rs. 5,000 odd against the petitioner; and he was desirous of executing it for about Rs. 600 against the sum of money lying to the credit of the petitioner in the Court of Small Causes, Madras. He got it attached by this Court, but instead of getting the money transferred to this Court and then proceeding against that money in this Court, he got an *ex parte* order transferring his decree to the Court of Small Causes and there executed it. The petitioner raised the objection that the Court of Small Causes had no jurisdiction to execute this decree because the value of the suit was for a sum of more than Rs. 2,000. This objection was overruled by the learned Judge of the Court of Small Causes on the ground that the transferee Court acts as the agent of the transferor Court, and he quoted *Narasayya* v. *Venkatakrishnayya*[1], *Shanmuga Pillai* v. *Ramanathan Chettiar*[2] and *Malabar Forests and Rubber Co., Ltd.* v. *Manavikraman Thirumalpad*[3] in support of his conclusion.

The cases quoted in the preceding paragraph were based on an interpretation of the general sections of the Code of Civil Procedure relating to transfer for execution; and the learned Judges were considering a transfer to an ordinary Civil Court and had no occasion to consider the special position of Courts of Small Causes. Although the Code of Civil Procedure governs procedure in Courts of Small Causes also, there are a few provisions of the Code that relate only to such Courts. Those special provisions must necessarily prevail when we are considering the procedure relating to such Courts. One of the special provisions is Order 21, rule 4. That rule enables the Court of Small Causes to execute decrees of other Courts only when two conditions are fulfilled. One is that the decree has been passed in a suit in which the value as set forth in the plaint does not exceed Rs. 2,000, and the other is that the suit as regards its subject-matter is not excepted by the law for the time being in force from the cognizance of either a Presidency or a Provincial Court of Small Causes. It follows therefore that the Presidency Court of Small Causes, Madras, had no jurisdiction to execute this decree and therefore acted without jurisdiction in doing so.

Another argument that the respondent might have put forward in support of the lower Court's order was that Order 19, rule 30 of the Original Side Rules lays down the method of execution in such cases and says that,

> "Where the property sought to be attached is in the custody of another Court, the execution application shall ask that, after attachment, the decree may be transmitted to that Court for execution; and if the attachment is made . . . . the Registrar shall transmit the decree accordingly."

That at first sight would seem to be inconsistent with Order 21, rule 4 of the Code of Civil Procedure. The rules in Schedule I of the Code of Civil Procedure apply in general to High Courts unless the rules specially framed for the High Court or any other provisions of the Code of Civil Procedure make those rules of the Code of Civil Procedure inapplicable to High Courts; for Order 1, rule 3 of the Original Side Rules repeals only such provisions of the Code of Civil Procedure as might be inconsistent with the Original Side Rules. So the question is whether Order 21, rule 4 of the Code of Civil Procedure can be said to be inconsistent with Order 19,

1. (1884) I.L.R. 7 Mad. 397.
2. (1894) 4 M.L.J. 91 : I.L.R. 17 Mad. 309.
3. (1933) 66 M.L.J. 418.

rule 30 of the Original Side Rules. Order 19, rule 30 purports to apply to all execution applications; but it seems incredible that the Original Side Rules were intended to abrogate the provisions of Order 21, rule 4, Civil Procedure Code, because Order 21, rule 4 seems to embody the important principle that Small Cause Courts should execute decrees only of such suits that the Small Cause Court could have itself entertained. I find it difficult to believe that Order 19, rule 30 of the Original Side Rules was intended to overrule such an important provision as Order 21, rule 4 of the Code of Civil Procedure. I feel sure that such a marked deviation from the Code of Civil Procedure would have been positively expressed and not left to be deduced by inference.

The petition is allowed and the orders of the lower Court and of the first Assistant Registrar set aside. The petitioner will be given his costs in this Court. In the lower Court each party will bear his own costs.

K.C. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING AND MR. JUSTICE KUPPUSWAMI AYYAR.

Kuruba Chinna Hanumakka .. *Appellant* (Accused-Prisoner).*

Penal Code (XLV of 1860), sections 302 and 328—Offence under—Poisonous drug administered in food —Object of wife to obtain domination and not to kill husband—Nature of offence.

The prosecution case was that the accused murdered her husband by poisoning him, the method of poisoning being by putting aconite powder into his evening meal. The evidence disclosed that the accused introduced the powder into the food but it also showed that she was not aware of the properties of the powder and that she administered the same as a love potion for the purpose of obtaining domination over the deceased and not for killing him.

Held, that the accused was liable to conviction for an offence under section 328 and not under section 302 of the Indian Penal Code.

Appeal against the order of the Court of Session of the Bellary Division, dated 3rd July, 1942 and made in C.C. No. 11 of 1942.

P. Basi Reddi as *amicus curiæ* for Appellant.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Judgment of the Court was delivered by

King, J.—This is an appeal from jail by one Chinna Hanumakka who has been convicted by the learned Sessions Judge of Bellary of the murder of her husband and sentenced to transportation for life. Mr. Basi Reddi has very kindly consented to act as *amicus curiæ* and we are grateful to him for his presentation of the case.

The prosecution case was that the appellant murdered her husband Thippanna on the night of the 29th of January last by poisoning him, the method of poisoning being by putting aconite powder into his evening meal. There can be no doubt, as found by the learned Sessions Judge, that this powder was introduced into the deceased's food on that occasion. Although the appellant denied everything in evidence against her at the trial, the evidence shows conclusively that she introduced the poison into her husband's food. She made a statement to that effect not only to several of the witnesses on the same night, but also in a formal statement under section 164 of the Criminal Procedure Code, before the Sub-Magistrate of Adoni on the 3rd of February, and now in her petition from jail she has given up her futile attempt to maintain that the whole case against her is false, and she has reverted to her original plea. Her case however is that although she introduced the aconite powder into her husband's food she did so with no intention to kill him. In fact she did not know that the effect of the aconite powder would be to cause his death. She says that it was given her by her own sister and she used it in order to recapture her husband's failing affections. The further evidence in the case is that the husband and wife were not living happily together. In fact the husband suspected his wife of being fond of her maternal uncle one Bhimanna. The deceased in this case was a man considerably older than the appellant and in a weak state of health. As we have stated, there is really no doubt whatever in this case that the poison was adminis-

*Crl. Appeal No. 404 of 1942. 6th November, 1942.

tered by the appellant. The only difficulty in the case arises, and this was realised by the learned Judge himself to be a serious difficulty, with regard to the intention of the appellant.

Mr. Basi Reddi asks us to take her statement before the Sub-Magistrate as the real truth in this case. There she says that her elder sister gave her a love potion and told her, that if she administered this to her husband he would be kind to her and subservient. She accordingly mixed it with his food. She did not know that her husband would die. This statement is, except in one important particular in conformity with what the witnesses say she told them. They agree that she told them that she did not expect her husband to die or know he would die, but that she gave the drug in order to make him "mad." There was no further investigation apparently at the time when the evidence was given as to what exactly the witnesses understood by the word "mad." It is now argued that what the appellant really must have meant at that time was only that she wanted to make her husband madly in love with her. The learned Judge discusses this matter in the final paragraph of his judgment. He points out that it is not easy to say that the appellant would be aware of the properties of the powder of which she had come into possession and that it might be possible that she did not know that it is so dangerous. However he seems to think that all possibility of accepting the view that she merely wished to use the powder as a love potion is ruled out by certain evidence given by P.W. 1. P.W. 1, it must be mentioned, is the wife of the deceased's brother. She and her husband were living in the same house as the deceased and the appellant and the house had not been actually divided by any walls even though the deceased and his brother had become separated in status. Her evidence is that two years before this offence the deceased had brought to her husband and herself some powdered glass mixed with chilly powder and complained that this must have been introduced into his house by his wife the appellant. She goes on to say that the appellant was rebuked and chastised for her conduct in procuring this dangerous material and the deceased was advised to get rid of her. The accused is said to have admitted that she intended to poison her husband with the glass and the deceased is said to have refused to send her away because he had no one else to cook for him.

P. W. 2 the husband of P. W. 1 makes no reference at all to this incident. The learned Judge holds that in all probability P.W. 2 was doing his best to tone down the case against the appellant and that P.W. 1 could not join in this purpose because she herself might feel that unless she told the whole truth suspicion might fall upon her as being the only other woman living in the same house. He therefore accepts the evidence of P.W. 1 as true and does not consider it in any way invalidated by the omission of P.W. 2 to corroborate it. We have considered this evidence carefully and are of opinion that it would be unsafe to accept it. There is no definite evidence to that effect, but it is not improbable, we think, that P.W. 1 and the accused may not have been on particularly good terms. We think the story is inherently improbable. The appellant was 18 years of age at the time of the offence and would therefore be only 16 when this incident is said to have occurred. We think it very unlikely that a girl of that age, even though she might have fallen in love with another man, would have been so depraved as to have conceived the idea of poisoning her husband by the use of powdered glass. It is perhaps significant also in regard to the animus of P.W. 1 that in cross-examination she does improve upon what she has stated in the examination in chief. There she merely stated the facts; but in cross-examination she goes on to say that the accused herself mentioned that she intended to poison her husband. That fact again is unlikely and it is still more improbable, we think, that the deceased, confronted with this attitude on the part of his wife, would have tamely consented to her remaining with him and going on cooking his food. We do not think therefore that we can rely upon this incident as any indication of the intention which the appellant had at the time of the offence two years later. We think the probabilities in this case are in favour of the view that the appellant did not intend to kill her husband but did intend to obtain some kind of domination over him. We think the statements of the witnesses and the use of the word "subservient" in her own statement to the Sub-Magistrate suggest that what she really

wanted to do was not so much to make her husband love her instead of hating her, but to deprive him of his will power and make him a kind of doting fool who would do anything she wished and be completely under her domination. That is an intention of course which cannot possibly result in any conviction for murder. But we consider that section 328 will apply to the facts of this case. Section 328 renders punishable any one who administers to any person any poison with intention to cause hurt to such person, and in the view which we have taken there can, we think, be no doubt that the intention of the appellant was to cause bodily infirmity to the deceased. The definition of hurt in section 319, Indian Penal Code, runs thus :

"Whoever causes bodily pain, disease or infirmity to any person is said to cause hurt."

We are unable to accede to the view that by the word "mad" which she used on the night of the offence, the appellant merely meant that the husband was to be madly in love with her. We think the word must be taken more literally as meaning that in one sense at least he must lose his mental powers and fall completely under the thumb of the appellant. It is significant in this connection that P.W. 2 has elaborated the statement of the appellant at the end of his examination in chief. He there says that on the night of the offence the appellant said she had put the poison in her husband's food to make him mad "so that she might go back to her village." This is another possible view of the case, *viz.*, that the deceased might be rendered completely incapable of interfering with the conduct of the appellant in carrying on intrigues with any one else whom she liked.

For the reasons which we have given we are unable to agree with the learned Sessions Judge in holding that the evidence in this case proves beyond reasonable doubt that the appellant intended to cause the death of her husband. We accordingly acquit her of the offence under section 302, Indian Penal Code and find her instead guilty of an offence under section 328. We do not consider that any but a lenient sentence is required in this case in view of the fact that the appellant has already gone through the mental anxiety of being tried on a charge which might have involved her being sentenced to death. We are of opinion that a sentence of six months' rigorous imprisonment will be adequate to meet the ends of justice, and order accordingly.

B.V.V. ——— *Conviction and sentence modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HAPPELL.

The Province of Madras, represented by the District Collector of Vizagapatam .. *Petitioner** (*1st Defendant*)

v.

Sri Sri Sri Vikrama Deo Varma Maharajulungaru, Maharaja of Jeypore and Zamindar of Madgole .. *Respondent* (*Plaintiff*).

Civil Procedure Code (*V of 1908*), *section 80—Suits under section 14 of Madras Survey and Boundaries Act—Two months' notice under section 80 of the Civil Procedure Code—Necessity.*

Notice—Day of service to be excluded from period of two months.

In the case of a suit brought under section 14 of the Madras Survey and Boundaries Act, there is no reason why the Government should not have the two months' notice required by section 80 of the Civil Procedure Code.

Collector of Bombay v. *Kamalavahooji*, A.I.R. 1934 Bom. 162, distinguished.

A suit against the Government under section 14 of the Survey and Boundaries Act is distinguishable from a suit brought under Order 21, rule 63 of the Code, since a suit under section 14 of the Survey and Boundaries Act cannot be regarded as being a suit in the nature of an appeal and notice cannot be dispensed with.

Even if the Government is added merely as a *pro forma* defendant such a notice under section 80, Civil Procedure Code, is necessary and in computing the period of two months the day on which it was actually served must be excluded.

Petitions under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the orders of the Court of the District Munsiff of Chodavaram, dated 24th December, 1941 and passed in O.S. No. 455 of 1938, etc.

---

*C.R.Ps. Nos. 941 to 951 of 1942. 14th October, 1942.

The Government Pleader (*K. Kuttikrishna Menon*) for Petitioner.

D. V. Reddi Pantulu for Respondent.

The Court delivered the following

JUDGMENT.—These eleven revision petitions arise out of eleven suits brought by Sri Sri Sri Vikrama Deo Varma Maharajulungaru, Maharaja of Jeypore and Zamindar of Madgole, under section 14 of the Madras Survey and Boundaries Act. In all these suits the Province of Madras represented by the District Collector of Vizagapatam was the first defendant and the first defendant is the petitioner in each of these eleven revision petitions. The petitioners contended in all the suits that at any rate as against them the suit should be dismissed *in limine* for the reason that the two months' notice of suit as required by section 80 of the Civil Procedure Code had not been served on them. The learned District Munsiff tried this question as a preliminary issue and found that all the suits were maintainable as against the Provincial Government. There were really two questions decided by the learned District Munsiff. The first was whether in the circumstances of the case the two months' notice was required at all under section 80 of the Code, and the second whether, if notice in accordance with the provisions of that section was necessary, the two months' notice had, in fact, been given. In three of the suits notice was served on the 15th of June, 1938, and the suits were instituted on the 15th of August, 1938. In five of the suits notice was served on the 15th of August, 1938 and the suits were instituted on the 15th of October of the same year. In two of the suits notice was served on the 15th of January, 1939 and the suits were instituted on the 15th of March, 1939. In one suit notice was served on the 15th of September, 1939 and the suit was instituted on the 15th of November, 1939.

These petitions have been filed under the provisions of section 115 of the Civil Procedure Code and it has been argued for the respondent that they are not maintainable for the reason that no question of jurisdiction is involved. It is plain, however, that if in fact notice had to be given as required by section 80 of the Code and if notice was not given in accordance with the provisions of that section the Court had no jurisdiction to entertain the suit as against the Provincial Government. It is true that the lower Court has found that notice was not necessary under section 80 and that, even if it was necessary, notice was in fact given in accordance with the provisions of that section. The question however in my opinion does not cease to be a question of jurisdiction merely because the lower Court had decided wrongly questions which if decided rightly would have left it without jurisdiction to entertain the suits. In my judgment, therefore, the petitions are maintainable.

The learned District Munsiff was of opinion that notice was not necessary under section 80 of the Civil Procedure Code for three reasons, firstly, because this was what he called a statutory suit to which section 80 of the Code did not apply ; secondly, because the suit was in the nature of an appeal and again to such a suit the provisions of section 80 of the Code would not apply, and thirdly because, Government not being a necessary party to the suit, the two months' notice under section 80 of the Code had not to be given. In my opinion the reasons given by the learned District Munsiff for the conclusion which he has reached cannot be supported either on principle or on authority. On the face of it there would appear to be no reason why the Government should not receive the two months' notice required by section 80 of the Code in the case of a suit brought under section 14 of the Survey and Boundaries Act just as in the case of any other suit. It is true that in *Collector of Bombay* v. *Kamalavahooji*[1], it was held that section 80 of the Civil Procedure Code would not apply to a suit on account of land revenue brought under the Bombay City Land Revenue Act. Section 14 of that Act however specifically provided that the decision of the Collector in the matter of the levy of the assessment of land revenue should be final unless a suit was brought within thirty days of the communication of the Collector's decision. The Bombay City Land Revenue Act was prior in date to section 80 of the Civil Procedure Code and the case was decided on the well-established principle that

1. A.I.R. 1934 Bom. 162.

where there is a conflict between a special Act and a general Act the provisions of the special Act prevail. Section 14 of the Survey and Boundaries Act provides for limitation a period of three years but makes no specific provision with respect to the period between the service of notice and the institution of the suit. The decision in the 1934 Bombay case, therefore, has no application to a case filed under section 14 of the Survey and Boundaries Act and there is nothing in that Act which will render the provisions of section 80 of the Civil Procedure Code inapplicable to a suit brought under it.

With regard to the second point the provisions of section 49 (1) of the Court of Wards Act in regard to notice to minors are analogous to the provisions of section 80 of the Civil Procedure Code in regard to notice of suit to Government and it has been held by a Bench of this Court in *Rajah of Ramnad* v. *Subramaniam Chettiar*[1] that a suit to set aside an order on a claim petition brought under Order 21, rule 63 of the Civil Procedure Code against a minor will not be bad for want of notice under section 49 (1) of the Madras Court of Wards Act for the reason that the suit should be deemed to be a continuation of the proceedings in respect of the claim petition. It has however been pointed out in decisions of Venkatasubba Rao, J. (*Rangaswami Goundan* v. *Ramanathan*[2]) and of Varadachariar, J. (*Zemindar of Sivaganga* v. *Muthayyan Chettiar*[3]) that a suit brought against the Government under section 14 of the Survey and Boundaries Act is distinguishable from a suit brought under Order 21, rule 63, since a suit under section 14 of the Survey and Boundaries Act cannot be regarded as being a suit in the nature of an appeal. With respect I find myself in agreement with the opinions expressed in these two cases.

The third point, namely, that a notice under section 80 of the Civil Procedure Code need not be served unless the Government is a necessary party appears to be contrary to the plain words of section 80 of the Code and to be devoid of all support or authority. On the contrary, it was held in *Secretary of State for India in Council* v. *Amarnath*[4], that even if Government was made a *pro forma* defendant notice was none the less necessary under the provisions of section 80 of the Code. Section 80 of the Code provides that,

> " No suit shall be instituted against the Crown . . . . . until the expiration of two months next after notice in writing has been served."

It has been laid down by the Judicial Committee in *Bhagchand Dagadusa* v. *Secretary of State for India*,[5] that the provisions of section 80 are " express, explicit and mandatory " and, in my opinion, there are no grounds for holding that in these suits brought under section 14 of the Madras Survey and Boundaries Act to which the plaintiff chose to make the Provincial Government a party two months' notice as required by section 80 of the Civil Procedure Code was not necessary in order that the suit should be maintained against the Provincial Government. It should be observed that although the lower Court has proceeded on the footing that the Government was not a necessary party the Government itself has not conceded this position.

There remains to be considered the question whether the notice actually given complied with the provisions of section 80 of the Code. The learned District Munsiff thought that it did because of the provisions of section 10 of the General Clauses Act. Section 10 of the General Clauses Act clearly has no application since section 80 of the Civil Procedure Code does not direct that any act or proceeding should be done or taken in any Court or office on a certain day or within a prescribed period. The question whether the day on which notice was actually served should be excluded in calculating the period of two months provided in section 80 has been considered by Venkataramana Rao, J., in *Marina Ammay* v. *Secretary of State*[6]. The learned Judge reviewed in his judgment the English authorities that bore on the question and concluded that the day on which notice was served must be excluded. In the course

1. (1928) I.L.R. 52 Mad. 465.
2. (1931) 67 M.L.J. 426.
3. (1936) 43 L.W. 535.
4. (1935) I.L.R. 15 Pat. 353.
5. (1927) 53 M.L.J. 81 : I.L.R. 51 Bom. 725 at 747 (P.C.).
6. (1941) 1 M.L.J. 547.

of his judgment Venkataramana Rao, J., quoted the observations of Baron Alderson at page 236,

"Where there is given to a party a certain space of time to do some act, which space of time is included between two other acts to be done by another person, both the days of doing those acts ought to be excluded, in order to ensure to him the whole of that space of time."

It should be noted that the words used in section 80 of the Civil Procedure Code are "two months next after notice in writing has been served." It seems to me that the decision of Venkataramana Rao, J., with which I respectfully agree, is in accordance with the words used and with the accepted practice in the construction of provisions regarding the periods of time given for performing certain acts. It follows, therefore, that the provisions of section 80 of the Civil Procedure Code were not complied with in respect of the service of notice in the eleven suits out of which these revision petitions arise.

The result must, therefore, be that the revision petitions are allowed with costs and that the suits will stand dismissed as against the Provincial Government also with costs.

K.S. ——— *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUNHI RAMAN.

M. Kothandapani Mudaliar .. *Petitioner** (*Deft.*)

v.

Dhanammal .. *Respondent* (*Plff.*).

Indian Contract Act (I of 1872), sections 23 and 25—Past illicit cohabitation—Consideration for a promissory note—Suit to recover the amount—Whether enforceable.

The weight of authority in Madras is in favour of the view that past illicit cohabitation may validly support a promise to pay a sum of money as in the present case, where the defendant was sued to recover an amount due under a promissory note executed in favour of a woman in consideration of past illicit intercourse.

Ganapati Chetti v. *Sundararaja Pillai*, A.I.R. 1930 Mad. 239, dissented from.

Namberumal Chetti v. *Veeraperumal Pillai*, (1930) 59 M.L.J. 596, followed.

Under the English law also such a consideration is not regarded as immoral (*vide* Halsbury's Laws of England, Vol. 7, p. 162).

Petition under section 25 of Act IX of 1887 praying that the High Court will be pleased to revise the decree of the Court of the District Munsiff of Cuddalore, dated 25th March, 1941 and passed in S.C.S. No. 725 of 1940.

M. S. Venkatarama Aiyar for Petitioner.

K. Srinivasan for Respondent.

The Court delivered the following

JUDGMENT.—The defendant is the petitioner. The suit was to recover the amount due under a promissory note executed by him in favour of one Lakshmi Ammal who subsequently endorsed the note to the plaintiff-respondent. On the evidence, the trial Court has found that the suit promissory note, Ex. A, was executed by the defendant in consideration of past illicit intercourse and has decreed the suit.

The petitioner's learned advocate relies upon the decision of Sundaram Chetty, J., in *Ganapathi Chetti* v. *Sundararaja Pillai*[1], where the learned Judge took the view that past illicit cohabitation is immoral consideration under section 23 of the Indian Contract Act and it cannot therefore support a promise. The plaintiff-respondent's learned advocate on the other hand argues on the authority of certain other decisions which will be referred to presently that so far as this Court is concerned, it is now settled that although future illicit cohabitation cannot support a promise for the reason that it is immoral consideration, yet there is nothing wrong in a promise made in consideration of past cohabitation. It can only amount to a promise to compensate a person who has voluntarily rendered service for the promisor within the meaning of section 25, clause (2) of the Indian Contract Act and as such it is a valid

*C.R.P. No. 1227 of 1941. 22nd September, 1942.

1. A.I.R. 1930 Mad. 239.

contract. He concedes that the Bombay High Court has taken a different view in the cases in *Hussain Ali* v. *Dinbai*[1] and *Kisendas* v. *Dhondu*[2], but he relies on the observations of Bhashyam Ayyangar, J., in *Lakshminarayana Reddiar* v. *Subhadri Ammal*[3] which have been followed in the decision in *Namberumal Chetti* v. *Veeraperumal Pillai*[4], where one of the learned Judges expressed dissent from the view taken in Bombay and by Sundaram Chetty, J., in Madras. There also there was a promissory note which was executed in consideration of past cohabitation. Ramesam, J., states in the course of his judgment as follows :—

" The next question that arises is whether the plaintiff can recover any amount on the promissory note. It is said that the promissory note is for an immoral consideration. On this point, I am inclined to agree with the view of the trial Judge and not with the Bombay cases such as *Hussain Ali* v. *Dinbai*[1] and *Kisendas* v. *Dhondu*[2] . . . . . In Indian Law past consideration is good consideration and as there is nothing immoral in remunerating a woman who has rendered services for such past services, the consideration is good. Vide *Lakshminarayana Reddi* v. *Subhadri Ammal*[3], per Bhashyam Ayyangar, J., with whose judgment I agree. I am unable to agree with the judgment of Sundaram Chetty, J., in *Ganapathi Chetti* v. *Sundararaja Pillai*[5]."

It will thus be seen that the weight of authority in this Court is in favour of the view that past illicit cohabitation may validly support a promise to pay a sum of money as in the present case. Under the English law also such a consideration is not regarded as immoral. In Halsbury's Laws of England (Hailsham edition), volume 7, page 162 a summary of the case-law on the subject is given in the following words :

" A contract which is made upon an immoral consideration or for an immoral purpose is unenforceable and there is no distinction in this respect between immoral and illegal contracts. The immorality here alluded to is sexual immorality. A promise by a man to pay money to a woman in consideration of illicit cohabitation which is to take place between them . . . . is void even if made under seal, but a promise which is made in consideration of past cohabitation only is simply a voluntary promise and if made under seal can be enforced."

These authorities support the contentions of the respondent's advocate which seem to me to be well founded. The decision of the trial Court is therefore correct

Since no other point is pressed on behalf of the petitioner, this civil revision petition must be dismissed with costs.

K.C. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HAPPELL.

Rao Sahib Srinivasa Mudaliar .. *Petitioner** (*Petr.*)

v.

Ramudu Naidu and another .. *Respondents* (*Respts*).

Provincial Small Cause Courts Act (IX of 1887), section 34, and Civil Procedure Code (V of 1908), section 73 and Order 21, rule 82—Scope.

For the purposes of execution a small cause decree has to be transferred to the original side of the Court though presided over by the same Judge for the reason that the sale of immovable property in execution of that decree can only be ordered by a Court other than a Court of Small Causes. The assets received by reason of the sale in execution of the decree must be regarded as received on the original side of the Court.

Chella Narasiah v. *Sontan Obbayya*, (1913) 25 M.L.J. 601, relied on.

Under section 73 of the Code of Civil Procedure in order that a decree-holder may be entitled to rateable distribution an application has to be made for execution to the Court holding the assets before the receipt of those assets. Accordingly a person holding another small cause decree of the same Court asking for rateable distribution where immovable properties are sold in execution of a small cause decree must get a transfer of his decree to the original side of the Court and apply, though the same Judge is exercising small cause and original jurisdiction.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge of Vellore dated the 4th day of February, 1941 and made in E. A. No. 518 of 1940 in E. P. No. 77 of 1940 in O. S. C. No. 79 of 1939.

---

1. (1923) 25 Bom.L.R. 252.
2. (1919) I.L.R. 44 Bom. 542.
3. (1902) 13 M.L.J. 7.
4. (1930) 59 M.L.J. 596.
5. A.I.R. 1930 Mad. 239.

*C.R.P. No. 1725 of 1941 20th October, 1942.

S. Ramachandra Aiyar for Petitioner.

R. Viswanathan and *N. D. Varadachari* for Respondents.

The Court delivered the following

JUDGMENT.—The petitioner was the decree-holder in Small Cause Suit No. 2 of 1940 in the Vellore Sub-Court and the first respondent was the decree-holder in Small Cause Suit No. 79 of 1940 in the same Court. The respondent had his decree transferred for execution to the original side of the Subordinate Judge's Court as execution involved the sale of immovable property. The property was sold, and the assets were received on the 7th of November, 1940 and the 21st of November, 1940. The petitioner meanwhile had his decree transferred for execution to the District Munsiff's Court, Vellore, but sometime before the 5th of November, 1940, it was re-transferred to the Sub-Court and on 5th of November, 1940, an application was made for execution by the arrest of the judgment-debtor. The judgment-debtor in the two suits, Small Cause Suit No. 2 of 1940 and Small Cause Suit No. 79 of 1940 was the same. On 19th November, 1940, the petitioner applied to the Subordinate Judge for rateable distribution in respect of the assets realised in execution of the decree in Small Cause Suit No. 79 of 1940. The learned Subordinate Judge dismissed this application by a short order in which he observed :

> "There has been no transfer of the decree to this Court by the decreeing Court, namely, this Court on its small cause side. The petition is therefore not maintainable and is dismissed."

Under section 73 of the Code of Civil Procedure in order that a decree-holder may be entitled to rateable distribution an application has to be made for execution to the Court holding the assets before the receipt of those assets. The question in this civil revision petition therefore is whether the petitioner's execution petition was filed in the same Court or in a different Court from the Court in which the assets in respect of the execution of the decree in Small Cause Suit No. 79 of 1940 were received. The contention put forward on behalf of the petitioner in substance is that since both the petitioner's suit and the respondent's suit were small cause suits, the Court of the Subordinate Judge of Vellore is one and the same Court in respect of them even though the decree in one of the suits is executed on the original side of the Court. This contention is opposed to the only decision of this Court on the question which either side has been able to cite. That is a decision by Tyabji, J., in *Chella Narasiah* v. *Sontan Obbayya*[1]. In that case the facts are not distinguishable from the facts of the present case except that it is not entirely clear whether two small cause suits were in question or one small cause suit and one original side suit. In any case, the learned Judge held that in order to entitle a party to rateable distribution the decree of the applicant must either have been passed by the same Court which received the assets or there must have been a transfer of the decree to that Court ; and he held that the Court of the District Munsiff in the exercise of its small cause jurisdiction is not the same Court as the Court in exercise of its ordinary jurisdiction. The contention for the petitioner is that this decision, even if two small cause suits were in question, should not be followed by reason of the provisions of section 33 of the Provincial Small Cause Courts Act. The argument is that under section 33 the Court which is invested with small cause powers is one Court with respect to the exercise of its small cause jurisdiction and another Court with respect to the exercise of its jurisdiction in suits of a civil nature which are not cognizable by a Court of Small Causes ; and that, that being so, a Court cannot under any circumstances be one Court when exercising its jurisdiction in respect of one small cause suit and another Court when exercising its jurisdiction in respect of another small cause suit. In short the contention is that the Court is still exercising small cause jurisdiction even when it is dealing with a small cause suit the decree in which is being executed on the original side. This contention in my opinion is quite untenable in view of the provisions of section 7 and of Order 21, rule 82 of the Code of Civil Procedure as well as of section 34 of the Provincial Small Cause Courts Act itself. Under Order 21, rule 82 of the Code of Civil Procedure sales of im-

1. (1913) 25 M.L.J. 601.

movable property in execution of decrees may be ordered by any Court other than a Court of Small Causes and under section 7 the provisions of the Code relating to the execution of decrees against immovable properties do not extend to Courts constituted under the Provincial Small Cause Courts Act. Furthermore, it is clear from the terms of section 34 of the Provincial Small Cause Courts Act that execution of small cause decrees either on the original side or on the small cause side of the Court is contemplated. It is clear, therefore, that if for the purposes of execution a small cause decree has to be transferred to the original side of a Court presided over by the same Judge for the reason that the sale of immovable property in execution of that decree can only be ordered by a Court other than a Court of Small Causes, the assets received by reason of the sale in execution of the decree must be regarded as received on the original side of the Court, *i.e.*, in a Court other than a Court of Small Causes. With respect therefore, I agree with the decision of Tyabji, J., in *Chella Narasiah* v. *Sontan Obbayya*[1].

It has also been argued by learned counsel for the petitioner that his execution petition when retransferred back from the District Munsiff's Court, Vellore, should, in any case, be considered to have been retransferred to the original side of the Subordinate Judge's Court. The reason advanced in support of this contention is that when transferred to the original side of the District Munsiff's Court, Vellore, the suit assumed the character of an original suit and so on retransfer should automatically be taken to have been transferred to the original side of the Subordinate Judge's Court. This contention cannot be sustained ; first because the orders of transfer and retransfer are not before me ; and secondly because, in the absence of any order to the contrary, it must be taken that the District Munsiff on application being made, retransferred the suit to the Court which passed the decree, namely, the Court of the Subordinate Judge of Vellore in the exercise of its small cause jurisdiction.

In the result, therefore, the petition is dismissed with costs.

K.S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BYERS.

Thangapandian Nadar and others .. *Petitioners** (*Accused*).

Army Act (VIII of 1911), section 123 (1) and Criminal Procedure Code (V of 1898), sections 54 (1), 56 and 80—Arrest of person suspected to be a deserter from army—Procedure—Production of warrant or written authority before arrest—Not essential—Rescue of deserter after arrest—Offence.

The procedure for the arrest of a deserter from the army is governed by section 123 (1) of the Indian Army Act. The commanding officer concerned has only to send a written report of the desertion to the civil authorities. No warrant is actually issued in such a case but the deserter is to be arrested as if a warrant had been issued and therefore section 56, Criminal Procedure Code, which applies to arrests without warrant, can have no application to a case of this kind. The provisions of section 80 and the following sections of the Code will apply. All that section 80 requires is that the substance of the warrant shall be notified to the person to be arrested and, if the police officer be called upon to do so, he must also show him the warrant. It is open to argument that if the deserter when arrested had called upon the police officer to produce his authority the police officer should have shown him the letter from the commanding officer endorsed to him, as if it were a warrant under section 80 of the Code. But, on the other hand, it may be contended that as a deserter can be arrested under section 123 (1) of the Indian Army Act without any warrant, the production of a warrant cannot be insisted upon. Moreover section 54 (1) of the Code empowers any police officer to arrest without any warrant and without any order from a magistrate any person reasonably suspected of being a deserter from His Majesty's force and in such a case no question of the production of a warrant or order can arise.

Petition under sections 435 and 439 of the Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the Sub-Divisional Magistrate of Shermadevi, dated 6th November, 1941 and passed in C. A. No. 15 of 1942 preferred against the judgment of the Court of the Stationary Sub-Magistrate of Nanguneri in C. C. No. 374 of 1942.

---

1. (1913) 25 M.L.J. 601.

*Crl. R. C. No. 779 of 1942 4th December, 1942.
(Crl. R. P. No. 733 of 1942).

V. T. Rangaswami Ayyangar for Petitioners.

The Court delivered the following

JUDGMENT.—The four petitioners were convicted by the Stationary Sub-Magistrate of Nanguneri of offences punishable under sections 447, 353 and 225-B of the Indian Penal Code for the part they are alleged to have taken in rescuing from lawful custody a deserter from the army who had been recently arrested by the local station house officer. They were also convicted of rioting but this conviction was set aside on appeal by the learned Sub-Divisional Magistrate when he confirmed the convictions and sentences under the other three sections.

There are two points taken in revision. The first of them is that the procedure indicated by section 56 of the Criminal Procedure Code was not properly observed, because it eventually came out in cross-examination that the Head Constable who effected the arrest had not got with him the authority on which he relied for making the arrest. The second point is that the learned Sub-Divisional Magistrate has not considered the evidence regarding the offences under sections 447 and 353 of the Code.

Regarding the first point, an attempt was made before the trial Magistrate to show that the Head Constable had not shown the deserter the written order contemplated by section 56 (1) and therefore the arrest was illegal and the accused were entitled to release their companion from this unlawful custody. The Head Constable found himself in some difficulty in explaining this and he obviously resorted to a considerable amount of prevarication in an attempt to conceal from the Court the fact that he had not taken with him the order directing him to make the arrest. If he had been a little more acquainted with the procedure for effecting the arrest of deserters from the army, he need have had no apprehensions about his failure to exhibit the order. Section 123 (1) of the Indian Army Act governs the procedure in these matters. The procedure is for the commanding officer concerned to send a written report of the desertion to the civil authorities, who " shall thereupon take steps for the apprehension of the said deserter in like manner as if he were a person for whose apprehension a warrant had been issued by a Magistrate." The authority informed in this particular case was the District Superintendent of Police, Tinnevelly, and he forwarded the report to the Sub-Inspector of the particular police station. He briefly endorsed the order to the Head Constable who effected the arrest. It will be seen, therefore, that no warrant is actually issued in such a case but the deserter is to be arrested as if a warrant had been issued and therefore section 56, Criminal Procedure Code, which applies to arrests without warrant, can have no application to a case of this kind. The provisions of section 80 and the following sections of the Code will apply. All that section 80 requires is that the substance of the warrant shall be notified to the person to be arrested and, if the police officer be called upon to do so, he must also show him the warrant. There has never been any suggestion that the Head Constable did not tell the deserter the reason for his arrest and the discussion both in the Sub-Magistrate's Court and the Court of the Sub-Divisional Magistrate has centred round the failure of the Head Constable to produce the letter, Ex. C, which had been endorsed to him. It is open to argument that if the deserter had called upon him to produce his authority, the Head Constable should have shown him, Ex. C, as if it were a warrant under section 80 of the Code. But, on the other hand, it may be contended that as a deserter can be arrested under section 123 (1) of the Indian Army Act without any warrant, the production of a warrant cannot be insisted upon. Moreover, section 54 (1) of the Criminal Procedure Code empowers any police officer to arrest without any warrant and without any order from a Magistrate any person reasonably suspected of being a deserter from His Majesty's force, and, therefore, all that the Head Constable required to enable him to act was a suspicion that the person he was about to arrest was a deserter. Hence no question of the production of a warrant or an order can arise.

Regarding the second point, the argument in the appeal before the learned Sub-Divisional Magistrate seems to have proceeded entirely on section 56, Criminal Procedure Code and the facts constituting offences under sections 447 and 353 of

the Indian Penal Code do not appear to have been traversed at all. Mr. V. T. Rangaswami Iyengar, the petitioners' learned advocate, has suggested that there was, in fact, no evidence on which these convictions could be rested. According to the judgments of the lower Courts, the petitioners were guilty of a gross interference with public officers in the exercise of their duty. They forced their way into a police station and rescued from police custody a deserter from His Majesty's army who had been lawfully arrested and who is now, I am informed, still at large in spite of the lapse of another nine months. The convictions are upheld. The sentences are by no means excessive. The petition appears to be without any real substance and it is ordered to be dismissed.

K.S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Mantravadi Subrahmanya Sastri and others .. *Appellants** (*Defts.*)

v.

Appana Krishnabrahmam and another .. *Respondents* (*Plffs.*).

Promissory note—Names of payees—Payees partners of a firm—No mention of firm's name in the note—Maintainability of suit by payees individually.

Where on a promissory note the names of two persons were mentioned as payees and no firm's name of which they were partners had any mention on the note,

Held, that in construing such a note the Court could not look beyond what was found in the instrument and a suit by them in their personal capacity on the note is maintainable.

Sivagurunatha v. *Padmavathi*, (1941) 1 M.L.J. 441 : I.L.R. (1941) Mad. 513 (F.B.), followed.

Appeal against the order of the Court of the Subordinate Judge of Amalapuram, dated 18th July, 1941 and made in A. S. No. 99 of 1940, preferred against the decree of the Court of the District Munsiff of Razole in O. S. No. 70 of 1940.

P. Somasundaram and *P. Suryanarayana* for Appellants.

Ch. Raghava Rao for Respondents.

The Court delivered the following

JUDGMENT.—Two persons named Appana Krishnabrahmam and Appana Krishnamurthy conducted a partnership business, but the firm was not registered. They are the plaintiffs in the suit. The defendants are two persons who executed the promissory note (Ex. A) in favour of the plaintiffs. The trial Court, by considering matters extraneous to Ex. A, held that the suit was not maintainable because the firm was not registered. In appeal, the Subordinate Judge said that although that might be the case, the plaintiffs should be allowed to amend the plaint; for after the filing of the suit the firm had registered itself.

I agree with Mr. Somasundaram for the appellants that the ground on which the learned Subordinate Judge remanded the suit was wrong; but it seems clear to me that the suit was maintainable in the original form in which it was filed. The promissory note was executed in the names of Appana Krishnabrahmam Garu and Krishnamurthi Garu. That means that the only persons who can sue on that promissory note are Appana Krishnabrahmam and Krishnamurthi. There is no mention of the firm in the promissory note; and I do not think that the fact that "గార్లకు" was written after the two names and not a separate "గారు" after each name makes any real difference. The promissory note was executed in favour of these two persons and not of the firm of which they were the partners.

It was made clear by a Full Bench of this Court in *Subba Narayana Vadhiar* v. *Ramaswami Iyer*[1] that no person can sue on a negotiable instrument unless he is named therein as payee or unless he had become entitled as endorsee or bearer. The decision of the Privy Council in *Sadasuk Jankidas* v. *Sir Kishan Pershad*[2], which is the basis for the subsequent cases on that point, says that the name of the person or firm

* A. A. O. No. 603 of 1941. 26th October, 1942.

1. (1906) 16 M.L.J. 508 : I.L.R. 30 Mad. 88 (F.B.).

2. (1918) 36 M.L.J. 429 : L.R. 46 I.A. 33 : I.L.R. 46 Cal. 663 (P.C.).

to be charged upon a negotiable instrument should be clearly stated on the face or on the back of the document so that the responsibility is made plain, and can be instantly recognised as the document passes from hand to hand. It is true that in this case we are concerned with the payee and not with the maker of the note; but the payee would also be liable if the instrument were negotiated and only the person noted in the promissory note as the payee would be liable in a suit by a subsequent holder. Their Lordships of the Privy Council go further and say :

"It is not sufficient that the name of the principal should be 'in some way' disclosed, it must be disclosed in such a way that on any fair interpretation of the instrument his name is the real name of the person liable on the bill."

That disposes of the subtle argument of the learned District Munsiff, that the omission of the house-name of Krishnamurthi and the use of the word "గార్లు" indicates that it is not the individuals who are the payees, but the firm. This was emphasised by a Full Bench of five judges of this Court recently in *Sivagurunatha* v. *Padmavathi*[1], where they point out that the decision of the Privy Council in *Sadasuk Jankidas* v. *Sir Kishan Pershad*[2] had not been followed in some of the subsequent cases. The learned Judges say:

"In construing such an instrument (promissory note) the Court cannot look beyond what is stated in the instrument."

Mr. Somasundaram refers to *Shanmughanatha Chettiar* v. *Srinivasa Iyer*[3], a decision of a Bench of this Court in which no mention was made in the promissory note of the name of the firm but nevertheless a partner who was not a party to the promissory note was made liable. Though this case was not specifically referred to in *Sivagurunatha* v. *Padmavathi*[1], it seems clear that it departs very considerably from the principle laid down in *Subba Narayana Vadhiar* v. *Ramaswami Iyer*[4], *Sadasuk Jankidas* v. *Sir Kishan Pershad*[2] and *Sivagurunatha* v. *Padmavathi*[1] and so cannot now be considered to be good law.

The appeal is therefore dismissed with costs. This means that the remand order will stand and the District Munsiff will dispose of it on the footing of its being a suit by Appana Krishnabrahmam and Appana Krishnamurthi personally. The fact that they have a right to sue on the promissory note in their personal capacity does not prevent them of course from contending that the promissory note was executed in discharge of some amount due to the firm of which they were partners.

The memorandum of cross-objections is now unnecessary and is dismissed; no costs.

K.C. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUPPUSWAMI AYYAR.

Bobba Varalakshmamma .. *Appellant** (*Respt.*)

v.

Kosaraju Jannayya .. *Respondent* (*Petr.*).

Civil Procedure Code (V of 1908), Order 21, rules 84 and 85—Decree-holder auction-purchaser—If bound to pay within 15 days from date of sale the amount payable rateably to other creditors out of the sale proceeds.

Under rules 84 and 85 of Order 21 of the Code of Civil Procedure, it is not the duty of the decree-holder auction-purchaser to pay within 15 days from the date of sale, that portion of the amount that may be payable rateably to the other creditors who may claim a share in the assets realised by the sale over and above the amount deposited by him into Court representing the difference between the amount for which he purchased the properties and the amount due to him under the decree. Accordingly the Court has no jurisdiction to set aside an execution sale on the ground that

---

1. (1941) 1 M.L.J. 441 : I.L.R. (1941) Mad. 513 (F.B.).
2. (1918) 36 M.L.J. 429 : L.R. 46 I.A. 33 : I.L.R. 46 Cal. 663 (P.C.).
3. (1916) 31 M.L.J. 138 : I.L.R. 40 Mad. 727.
4. (1906) 16 M.L.J. 508 : I.L.R. 30 Mad. 88 (F.B.).

*A. A. A. O. No. 260 of 1940 and C. R. P. No. 2065 of 1940.

7th October, 1942.

the decree-holder auction-purchaser had not deposited within 15 days of the sale the amount payable to the creditors entitled to rateable distribution.

Murugappa Chettiar v. *Ramaswami Chettiar*, (1935) I.L.R. 59 Mad. 342 and *Madden* v. *Chappani*, (1887) I.L.R. 11 Mad. 356, referred to.

Appeal against the order of the Court of the Subordinate Judge of Masulipatam dated 3rd April 1940 and passed in A. S. No. 21 of 1940 (A.S. No. 179 of 1939, District Court, Kistna) preferred against the order of the Court of the District Munsiff of Gudivada, dated 26th June, 1939 and passed in E. A. No. 1479 of 1936 in O. S. No. 53 of 1935, on the file of the Court of the District Munsiff of Bander, etc.

P. Sivaramakrishnayya for Appellant.

A. Lakshmayya and *N. V. B. Sankara Rao* for Respondent.

The Court delivered the following

JUDGMENT.—These arise out of an application to execute the decree in O. S. No. 53 of 1935 on the file of the District Munsiff's Court of Masulipatam. It was a simple money decree. The properties of the judgment-debtor were attached and sold in a Court sale held on the 2nd July, 1936. The decree-holder had obtained permission to bid and set off and his bid for Rs. 1,562 was accepted. The amount shown in the sale proclamation as due under the decree was Rs. 1,010. On the date of the sale he deposited into Court Rs. 390-8-0. On 11th July, 1936, he deposited a further amount of Rs. 161-8-0 which represented the balance payable by him to make up the difference between the amount for which he purchased and the amount realisable under the sale proclamation.

Another creditor of the judgment-debtor, who is the 1st respondent in the Civil Revision Petition, laid a claim for rateable distribution of the assets realised. It was ultimately found that Rs. 601-2-3 was due to her. On the 3rd July itself the decree-holder evidently coming to know that there was a claim for rateable distribution filed a petition offering to deposit of Rs. 161-8-0 after giving effect to the set off and wanted the Court to let him know what further amount will have to be paid to make up the amount necessary to pay the other creditors by way of rateable distribution. The Court passed an order " petitioner may deposit only that amount required for payment to decree-holders who applied for and are entitled to rateable distribution of the assets." This order is dated 11th July, 1936 and no time was fixed for payment of the additional amount payable to the rateable decree-holders.

On the 1st August, 1936, the other creditor as well as the judgment-debtor filed two applications for setting aside the sale on the ground that the auction-purchaser decree-holder had not deposited the requisite amount payable for the purchase within 15 days from the date of the sale. It was also stated that there were other irregularities in the sale. On 17th October, 1936, the amount due to the other creditor was fixed at Rs. 601-2-3 and the balance of the amount due to the creditor entitled to share rateably in the assets realised by the sale was deposited by the decree-holder auction-purchaser on 22nd October, 1936. The learned District Munsiff, three years later, passed an order setting aside the sale on the ground that it was the duty of the auction-purchaser decree-holder to have deposited within 15 days the money payable to the other decree-holder entitled to a share rateably in the assets realised by the sale and as that was not done he set aside the sale. No evidence appears to have been let in with regard to the irregularities mentioned in the petition and the learned District Munsiff has not dealt with them. On appeal the learned Subordinate Judge agreed with the learned District Munsiff and dismissed the appeal.

Subsequent to the setting aside of the sale the decree-holder took steps in the execution proceedings for bringing the properties to sale. Evidently it was a precautionary measure taken by him to save time in case he should fail in the appeal filed by him against the order setting aside the sale. But before the properties were brought to sale the judgment-debtor deposited the decree amount on 25th August, 1939. The learned Subordinate Judge of Masulipatam held that the conduct of the decree-holder in having taken steps in execution subsequent to the setting aside

of the sale for bringing the properties to sale again, disentitled him to continue the appeal for setting aside the order cancelling the sale.

Hence this appeal. I do not think that the learned Subordinate Judge was justified in finding that under rules 84 and 85 of Order 21 of the Code of Civil Procedure it is the duty of the decree-holder auction-purchaser to pay within 15 days from the date of sale that portion of the amount that may be payable rateably to the other creditors who may claim a share in the assets realised by the sale over and above the amount deposited by him into Court representing the difference between the amount for which he purchased the properties and the amount due to him under his decree. In this case permission to bid and set off had been obtained by the decree-holder. Under Order 21, rule 84, Civil Procedure Code, 25 per cent. of the amount of the purchase money should be deposited on the date of the sale. This the auction-purchaser has done. Under rule 85, the full amount of purchase money payable and the amount required for the general stamp should be paid by the purchaser within 15 days from the date of the sale. There is a proviso to that rule which says that in calculating the amount to be so paid the purchaser shall have the advantage of any set off to which he may be entitled under rule 72. In this case, since the appellant had obtained the permission of the Court to set off the amount, he was entitled to set off the entire amount due to him under the decree as against the balance of purchase money that may be payable by him after deducting 25 per cent. of the amount which was deposited by him on the date of the sale itself. It was urged before the lower Court that under rule 199 of the Civil Rules of Practice a decree-holder purchaser who obtained permission to set off will have to deposit the money payable to the several decree-holders entitled to rateable distribution. But that rule does not say when that amount should be deposited. In *Murugappa Chettiar* v. *Ramaswami Chettiar*[1], this Court had to consider the validity of that rule and it was held by Venkatasubba Rao, J., that it was *ultra vires* to the extent to which it was in contravention of rules 84 and 85 of O. 21, Civil Procedure Code. In that case the contention was that it was the duty of the auction-purchaser if he happened to be the decree-holder to deposit the entire purchase money whenever there was any other creditor entitled to claim a rateable distribution of the assets. His Lordship held that it was not so and that rule 199 of the Civil Rules of Practice to that extent was *ultra vires* as it went against the provisions of Order 21, rule 85. But his Lordship held that such an auction-purchaser will be bound to deposit the money payable to the creditors entitled to claim rateable distribution but it was not stated when that has to be paid.

It was taken by both the lower Courts that the money should be deposited within 15 days from the date of sale as it was purchase money. As the rateable distribution has to be made out of the assets realised at the sale and as the balance of purchase money as per Order 21, rule 85, C. P. Code, even after setting off the amount which the decree-holder in law is entitled to set off should be paid within 15 days it was considered the amount payable to the other creditors should be deposited within these 15 days. That it is not necessary that the amount payable to the creditors entitled to rateable distribution should be paid within 15 days of the sale is clear from the ruling in *Madden* v. *Chappani*[2]. There it was pointed out that a creditor entitled to claim rateable distribution has a summary remedy to proceed against the decree-holder auction-purchaser to realise his amount. If such amounts have to be deposited within 15 days from the date of the sale, then there could be no necessity for this summary remedy. The very fact that this Court held that he was entitled to a summary remedy indicates that the amount need not be deposited within 15 days. Since neither rule 199 of the Civil Rules of Practice nor the observations in *Murugappa Chettiar* v. *Ramaswami Chettiar*[1] state that such an amount is payable within 15 days from the date of the sale, and since the remedy open to a creditor entitled to rateable distribution is inconsistent with the contention that such money should be deposited within 15 days from the date of the sale, I find that both the lower Courts were wrong in finding that the non-payment of the money

1. (1935) I.L.R. 59 Mad. 342. 2. (1887) I.L.R. 11 Mad. 356.

payable to the creditor entitled to rateable distribution within 15 days from the date of the sale justifies the setting aside of the sale.

With regard to the other point on which the learned Subordinate Judge has held that the appellant is not entitled to pursue his remedy in appeal, he has proceeded on the basis that the remedy he sought by taking proceedings in execution for bringing the properties to sale on 28th February, 1939, was inconsistent with his claim in the appeal and that where a party has two remedies which are not co-existent but alternative if he chose to seek one remedy he will be barred from seeking the other. The correctness of this proposition of law is not disputed by the counsel for the appellant but what is stated is that that principle cannot be applied to the facts of this case. The decree-holder appellant had to keep alive the execution petition so that he may have his remedy by bringing the properties to sale in case he should fail in the appeal. If he succeeds in appeal then the sale will be confirmed and the subsequent proceedings will automatically become invalid because the decree will be satisfied by the confirmation of the sale. When a party has necessarily to seek another remedy in case he failed to get the relief which he sought for earlier and if he takes such proceedings, it cannot be said that during that period he will not be justified in taking steps to secure the later remedy to which he would be entitled in case he failed to obtain the relief in the earlier proceedings ; and that is the position of the appellant in this case. I therefore do not think it can be said that merely because the appellant pursued his remedy on the basis that the sale had been set aside he will not be entitled to contend in the appeal that the order setting aside the sale is invalid and that the sale will have to be confirmed.

It is further stated that there is an order entering satisfaction of the decree by reason of the deposit made by the judgment-debtor and that therefore the appeal which can be proceeded with only on the basis that the decree has not been satisfied is not maintainable. But the appellant is not responsible for the deposit of the money by the judgment-debtor. The judgment-debtor voluntarily paid the amount into Court to avoid the continuation of the proceedings in execution of the decree. The decree-holder has not drawn the amount from Court. The case reported in *Mangat Rai* v. *Duli Chand*[1], which is relied on by the respondent has no application to the facts of this case, because there the decree-holder received the amount from the judgment-debtor and therefore there was satisfaction of the decree by his electing to receive the amount. In this case the appellant has not received the amount but protested against the decree being satisfied by the judgment-debtor, depositing the amount in view of the fact that he had filed the appeal for setting aside the order cancelling the sale and therefore he cannot be estopped from claiming his remedy in the appeal.

It is urged for the respondent that the Civil Miscellaneous Second Appeal is not maintainable in view of the decision in *Mrs. J. Peliti* v. *Kanshi Gopal*[2], but their Lordships find that the decree-holder was in the position of the auction-purchaser and the dispute between the auction-purchaser and the judgment-debtor was not a matter relating to the execution and satisfaction of the decree. This Court has throughout held that the question between a decree-holder purchaser, and the judgment-debtor is a matter relating to the execution of the decree and therefore any question between them comes within the purview of section 47, C. P. Code. As a matter of fact as per the rulings of this Court, section 47, C.P. Code, is a bar to a suit by a decree-holder auction-purchaser for recovery of possession of properties purchased by him. He has to file the petition within three years from the date of sale to obtain delivery of possession of the properties. I do not think therefore I will be justified in holding that no appeal lies against the order passed in the appeal filed by the judgment-debtor.

The petition filed by the creditor claiming rateable distribution was also allowed and the appellant has filed the civil revision petition against that order. I have already found that the District Munsiff had no jurisdiction to set aside the

1. (1933) I.L.R. 55 All. 735. 2. A.I.R. 1939 Lah. 210.

sale on the ground that the decree-holder auction-purchaser had not deposited the amount payable to the creditor entitled to a share in the assets realised by the sale. The order being one passed without jurisdiction has to be set aside.

It is urged for the respondents that I should remand the petition to the lower Court for disposal of the other objections raised by the parties. But then no evidence had been let in on the other objections and it does not appear from the judgments of either the first Court or the appellate Court that this was treated as a preliminary point or the parties were prevented by the Court from letting in the necessary evidence with regard to the irregularities. I therefore do not think I will be justified six years after the sale to direct a fresh enquiry into the irregularities alleged.

In the result both the appeal and the petition are allowed, and the order of the Subordinate Judge and the District Munsiff setting aside the sale is set aside. The sale will be confirmed.

In C. M. S. A. No. 260 of 1940 the respondent will pay the appellant his costs in all the three Courts. I make no order as to costs in all the three Courts in the Civil Revision Petition.

Leave refused.

K.S. ——— *Appeal and petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUPPUSWAMI AYYAR.

Sri Venkateswaraswami Varu of Bezwada, by Trustees Rampilla Appalaswami and another .. *Petitioners** (*Claimants*)

v.

The Sub-Collector, Bezwada and another .. *Respondents* (*Respts.*).

Land Acquisition Act (I of 1894), section 18—Duty of Collector—Validity of reference—Whether Court can question it—Notice to interested persons by Collector—Whether obligatory—Period of limitation for party to apply.

It is the duty of the Collector before he makes the reference under section 18 of the Land Acquisition Act to decide on the materials before him whether he should make the reference or not, and if he decides to make and does make a reference, it is not open to the Land Acquisition Court to go behind it. If it is not open to the High Court or any other authority to interfere when the Land Acquisition Officer refuses to make a reference, his decision must be equally final when he decides to make and does make a reference.

Where the Collector, as the Land Acquisition Officer mentioned in a letter to the Subordinate Judge that he had doubts whether the reference should be made but the order of reference was worded as if it was a judicial order and gave the reason for reference and the names of the persons interested and the amount as required by the Act,

Held, (1) that in the absence in the order of reference of mention as regards the propriety of making the reference, the validity of the reference could not be questioned.

(2) It is not obligatory on the part of the Collector to give notice to interested persons whom he is not aware of. If he chooses to give notice, then that person will have to apply within six weeks for a reference being made. But if no notice is given, then the period of limitation within which to apply will be six months.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge of Bezwada, dated 7th August, 1940 and made in O. P. No. 33 of 1937.

D. Narasaraju for Petitioners.

The Government Pleader (*K. Kuttikrishna Menon*) for Respondents.

The Court delivered the following

JUDGMENT.—This is a petition by the managing trustees of the temple of Sri Venkateswara Swami Varu of Bezwada for revising the order of the learned Subordinate Judge of Bezwada in O. P. No. 33 of 1937 holding that a reference made to him under section 18 of the Land Acquisition Act by the Sub-Collector of Bezwada was incompetent and that the subject-matter of the reference cannot be enquired into by him. Certain properties of the temple were acquired under the Land Acquisition Act and an award was made on the 16th May, 1937. The temple had

* C. R. P. No. 640 of 1941. 12th November, 1942.

then only two trustees holding the office and a third trustee was appointed by the Hindu Religious Endowments Board on 4th May, 1937, for a period of five years from that day. But he seems to have got the order actually subsequent to 31st May, 1937. He gave an application to the Land Acquisition Officer on 1st October, 1937, requesting him as Collector to make a reference under section 18 of the Act as the amount fixed by the award was insufficient. He also disputed the correctness of the area and measurements of the land as given in the award. The Land Acquisition Officer passed an order on the 24th November, 1937, making the reference to the learned Subordinate Judge of Bezwada. But he sent it to the Subordinate Judge with a letter dated 7th December, 1937. It was contended before the learned Subordinate Judge by the Government Pleader that the Collector had no jurisdiction to make the reference as the person who gave the application was not a person interested and that the application was given out of time. It was pleaded for the claimants that the Subordinate Judge had no jurisdiction to go into the question as to whether a reference was in order or not and that the only jurisdiction which the Court had was to consider whether the area and measurements were correctly given and the amount awarded was adequate.

The Subordinate Judge found that he had jurisdiction to go into the matter, that the application was made out of time and that the person could not be said to be a person interested. He therefore held that the reference was incompetent and the subject-matter of the reference could not be enquired into. Hence this petition to revise the order.

The points for consideration therefore are (1) whether the learned Subordinate Judge had jurisdiction to enquire into the validity of the reference and (2) if so, whether he was right in finding that the application was not made by a person interested and was out of time.

Point 1.—It is contended for the petitioner that the Subordinate Judge exercising jurisdiction under the Land Acquisition Act has limited jurisdiction and that it is not open to him to decide anything except the matters referred to him as it is the reference that gives him jurisdiction to enquire into the matter. In short, it is stated that since it is the reference that gives him the jurisdiction to enquire into the matter, it will not be open to him to enquire whether the reference was in order or not. It is admitted that there are no direct authorities of this Court on this point. In In re *the Land Acquisition Act*[1], it was held by a single Judge of the Bombay High Court that it was open to the Land Acquisition Court to go into the competency or validity of the reference. This was followed by the Lahore High Court in *Ghulam Muhyuddin* v. *Secretary of State*[2]. *Sukhbir Singh* v. *Secretary of State for India in Council*[3] also refers to it. But a contrary view was expressed in two later decisions of the Allahabad High Court, namely, *Secretary of State for India in Council* v. *Bhagwan Prasad*[4] and *Secretary of State* v. *Bhagwan*[5], where it was held that it is not open to the Land Acquisition Court to go into the question as to whether the reference was validly made or not. In none of the decisions of the Lahore and Allahabad High Courts cited before me for the respondent is any reason given as to why it was held by those Courts that the Land Acquisition Court had jurisdiction to enquire into the validity of the reference. In In re *the Land Acquisition Act*[1] that is what is stated:

> "Now, as was said by the Judicial Committee of the Privy Council in *Nusserwanjee Pestonjee* v. *Meer Mynoodeen Khan Wullud Meer Sunderoodeen Khan Bahadur*[6], 'wherever jurisdiction is given to a Court by an Act of Parliament, or by a Regulation in India (which has the same effect as an Act of Parliament), and such jurisdiction is only given upon certain specified terms contained in the Regulation itself, it is a universal principle that these terms must be complied with, in order to create and raise the jurisdiction for if they be not complied with the jurisdiction does not arise.' The same case is also authority for the proposition that the compliance need only be substantial so as to be 'intelligible and clear'."

This is the only reason given by the Bombay High Court for the position that it is open to the Land Acquisition Court to go into the question as to the competency of

1. (1905) I.L.R. 30 Bom. 275 at 286.
2. (1914) 24 I.C. 379.
3. (1926) I.L.R. 49 All. 212.
4. (1929) I.L.R. 52 All. 96.
5. A.I.R. 1932 All. 597.
6. (1855) 6 M.I.A. 134 at 155.

the award. In the case of a reference under section 18 it is not the application of the party which gives jurisdiction to the Civil Court, but it is the reference made by the Land Acquisition Officer. An application may be given and the reference may not be made. Consequently if the application was not validly made, then it will only indicate that the reference was made without adequate grounds. But that will not make it any the less a reference which would give the Court jurisdiction to enquire into the question referred to. I do not think that the observations of the Privy Council in *Nusserwanjee Pestonjee* v. *Meer Mynoodeen Khan Wullud Meer Sunderoodeen Khan Bahadur*[1] referred to in In re *the Land Acquisition Act*[2] can be taken as authority for the position that it will be open to the Land Acquisition Court to go into the regularity or validity of the application on which the reference is made by the Collector. In *Secretary of State for India in Council* v. *Bhagwan Prasad*[3], a Bench of the Allahabad High Court held that the Court to which a reference has been made by the Collector on an application under section 18 of the Land Acquisition Act has no jurisdiction to go behind the reference in order to scrutinise its regularity and cannot enter into the question whether the application in pursuance of which it was made was within limitation or not. In re *the Land Acquisition Act*[2] and *Sukhbir Singh* v. *Secretary of State for India in Council*[4] were cited before that Bench and were not followed. The case *Sukhbir Singh* v. *Secretary of State for India in Council*[4] was distinguished on the ground that in that case the Collector had not been asked to make the reference at all and he made the reference on the assumption that a reference had been required. It was also pointed out that the claimants, not having ever asked the Collector to make a reference, could but with ill grace say that the Judge was bound to hear the reference, and that the learned Judges did not consider what authority the District Judge had to consider the propriety of the Collector's act which alone gave the Judge jurisdiction. At page 107 it is pointed out,

> " Section 20 of the same Act provides that the Court shall, on receipt of the reference, cause a notice, specifying a day on which the Court will proceed to determine the objections and directing their appearance before the Court on that day, to be served on the applicants. Reading the two sections together, I am clearly of opinion that the Court has no alternative but to act on the reference made by the Collector. The provisions of section 20 are mandatory, and the Court has no power to scrutinize the regularity of the proceedings before the Collector or the correctness of the view taken by the Collector, of the question of limitation relating to the application which moved him to make the reference. It was the province of the Collector alone to decide for himself whether he should make the reference or refuse to do so. If he decides the question of limitation one way or the other, the Act does not allow an appeal against his decision to the District Judge, the High Court or any other superior authority. If the Collector refuses to make a reference, holding that the application made to him for such reference had been made beyond the period of limitation prescribed, it is obvious that the aggrieved person, the owner whose land was acquired, could not have challenged his view before any tribunal. The Secretary of State, likewise, cannot question its correctness, if on the question of limitation the Collector's view is adverse to him and if he makes a reference to the Court. The functions which the Collector performs under the Land Acquisition Act are administrative and not judicial : *Ezra* v. *Secretary of State*[5]. I am, therefore, of opinion that the Court cannot go behind the reference to ascertain whether the applications in pursuance of which it was made were within limitation or otherwise, and consequently into the question whether the Collector should or should not have made the reference which he did."

This decision was followed by the Allahabad High Court in *Secretary of State* v. *Bhagwan*[6]. Their Lordships observed as follows :—

> " The ' Court ' does not sit on appeal over the Collector and the Act does not give any authority to the ' Court,' either in express terms or by implication, to go behind the reference and to see whether the Collector acted rightly or wrongly. It is the province of the Collector alone to decide for himself whether he should make the reference or refuse to do so."

In *Abdul Sattar Sahib* v. *Special Deputy Collector, Vizagapatam Harbour Acquisition*[7], a Full Bench of three Judges of this Court had to consider the question whether under section 115 of the Civil Procedure Code the High Court had the power to revise an order of the Collector refusing to make a reference on an application filed under

1. (1855) 6 M.I.A. 134.
2. (1905) I.L.R. 30 Bom. 275.
3. (1929) I.L.R. 52 All. 96.
4. (1926) I.L.R. 49 All. 212.
5. (1905) I.L.R. 32 Cal. 605.
6. A.I.R. 1932 All. 597 at 598.
7. (1923) 46 M.L.J. 209 : I.L.R. 47 Mad. 357 (F.B.).

section 18. It was held that the Court had no power to revise that order. The following observation was made by the learned Chief Justice at page 366,

"In *Ezra* v. *Secretary of State for India*[1], the Privy Council has decided that the Collector, exercising functions under the Land Acquisition Act down to the point when he gives what is called his award, is acting only in an advisory capacity and is not exercising any judicial function at all; but in these later cases, which I have referred to, it is pointed out, and I think correctly pointed out, that when he acts under Part III of which section 18 forms part, he is acting in a different capacity, because he has there to decide certain things; he has to send the case to the District Court if certain provisions in that section have been complied with, one of which is the question of time; that is to say, he has to decide whether the application is barred or not; and in doing so, in my judgment, he acts judicially."

At page 368, Ramesam, J. observed,

"I would only add that it is desirable that the Act should be amended so as to give a remedy to the subject in respect of possible arbitrary acts of Land Acquisition Officers in declining to refer under section 18 and not to leave them to depend upon the action of the Government in advising their officers."

From these observations it is clear that it is the duty of the Collector before he makes the reference to decide on the materials before him whether he should make the reference or not, and if he decides to make and does make a reference, it is not open to the Land Acquisition Court to go behind it. If it is not open to the High Court or any other authority to interfere when the Land Acquisition Officer refuses to make a reference, his decision must be equally final when he decides to make and does make a reference.

It is true that in this case unfortunately the Collector did not decide the point. At any rate, he says that the point was doubtful to him and this he mentions in his letter. The reference is not by the letter but by the order dated 24th November, 1937. It is worded as if it is a judicial order and he has given there the reason for reference and the name of the persons interested and the amount as required by the Act. He has not stated there that he had any doubts as to the propriety of his making a reference, though in the letter dated 7th December, 1937 he has referred to these facts. I therefore find that the learned Subordinate Judge had no right to question the validity of the reference.

Point 2.—Moreover, even on the merits, I do not think the learned Subordinate Judge was right. The order of appointment of the third trustee clearly indicates that he was appointed as trustee from the 4th May, 1937. It is true that it was not despatched at once and it is true also that it would come to have practical effect only after he accepted it. But if he accepts it, it will take effect from the 4th May, 1937. So in law he was a trustee from that date, though it is by fiction. But it cannot be denied that on the date on which the reference was made he was interested in the amount of compensation. It has been held that a presumptive reversionary heir as also a presumptive shebait of a temple are persons interested within the meaning of section 18 of the Land Acquisition Act. (Vide *Nandalal* v. *Arunchandra*[2], *Mst. Gangi* v. *Sanbi*[3]). In *Pratap Bhattudu* v. *A. E. L. Mission*[4], it was held that even an attaching creditor, though he has no legal interest in the property, is an interested person within the meaning of the section. Such persons do not receive notice of the Land Acquisition proceedings and of the award under section 12 (2). Under section 18 any person interested could make an application if the person making was present or was represented before the Collector at the time when he made his award, within six weeks from the date of the Collector's award or in other cases, within six weeks of the receipt of the notice from the Collector under section 12 (2), or within six months from the date of the Collector's award, whichever period shall first expire. Under section 12 (2) the Collector should give immediate notice of his award to such of the persons interested as are not present personally or by their representatives, when the award is made. If the applicant who moved the Collector in this case is a person interested, the Collector in the nature of things could not have sent him notice. As a matter of fact, the Collector may not know who are all interested in the matter. He could not have known who were the reversionary heirs or who were the prospective shebaits or who were the attaching creditors,

1. (1905) I.L.R. 32 Cal. 605.
2. (1935) 41 C.W.N. 464.
3. A.I.R. 1929 Lah. 736.
4. (1924) I.L.R. 49 Mad. 38.

in which case naturally he would not be giving them notice. It does not make it obligatory on the Collector to give notice to interested persons whom he is not aware of. If he chooses to give a notice, then that person will have to apply within six weeks. But if he does not give a notice, then the period of limitation will be six months. In this case the application was filed within six months from the date of the award. So on the merits also it cannot be said that the reference was incompetent.

In the result, the civil revision petition is allowed, the order of the learned Subordinate Judge is set aside and the application is remanded for being disposed of in the light of the observations made above. The costs of this petition will abide and follow the final result of the reference.

K.C. *Petition allowed.*

[PRIVY COUNCIL.]

[On Appeal from the Chief Court of Oudh at Lucknow.]

PRESENT :—LORD ATKIN, LORD THANKERTON, LORD ROMER AND SIR GEORGE RANKIN.

Bhuru Mal .. *Appellant.**

v.

Jagannath and others .. *Respondents.*

Hindu Law—Joint family—Nucleus—Business of coparcener—Whether joint or separate property—Presumption and onus of proof.

Whether or not it can be said that if a joint family is possessed of some joint property, there is a presumption that any property in the hands of an individual member is not his separate individual property but joint property, no such presumption can be applied to a business. Unless it can be shown that the business in the hands of a coparcener grew up from joint family property, or that the earnings were blended with joint family estate, they remain free and separate.

K. L. S. V. E. Annamalai Chetty v. *K. L. S. V. E. Subramanian Chetty,* (1928) 56 M.L.J. 435 (P.C.), followed.

The question whether a business carried on in the name of a coparcener was begun or carried on with the assistance of joint family property is a question of fact upon which the burden of proof lay upon those who claim a share in the business as constituting joint family property.

Rampershad Tewarry v. *Sheochurn Doss,* (1866) 10 M.I.A. 490 explained and distinguished.

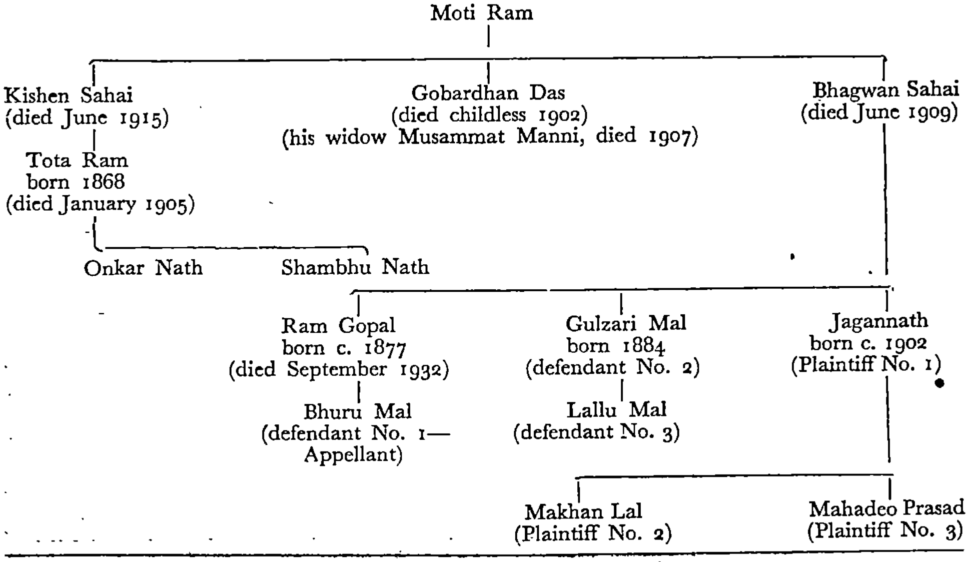
On appeal from a decision of the Chief Court of Oudh at Lucknow.

C. S. Rewcastle, K. C., S. Hyam and *Sir Alfred Wort* for the Appellant.

Respondent not represented.

The Judgment of the Court was delivered by

SIR GEORGE RANKIN.—



---

* P. C. Appeal No. 44 of 1939. 18th December, 1941.

This appeal is brought by the first defendant to a partition suit. The appellant Bhuru Mal is the only son of Ram Gopal, who died in September, 1932, and the first plaintiff is his uncle Jagannath, whose two sons are also plaintiffs. The appellant's co-defendants are his uncle Gulzari Mal and Lallu Mal, the latter's son.

The plaint claimed partition of the property comprised in seven schedules or lists lettered A to G. By one of the two decrees now under appeal which were passed by the Chief Court of Oudh on September 29, 1937, partition of the whole of this property has been directed. The Chief Court varied the decree which had been made on the 22nd December, 1934, by the trial Court, the Subordinate Judge of Partabgarh, both as to the plaintiffs' share and as to the assets to be divided. They held the share of the plaintiffs to be a one-third share and not an eighteenth share as the trial Court had declared in respect of all save one (item 11 of List A) of the items which it had included in the decree. The trial Court had excluded from the partition the two houses in Macandrewganj occupied by Gulzari Mal and Jagannath respectively, being items 2 and 3 of List A. It had also excluded the whole contents of Lists E, F and G —E being a list of the assets of a business carried on since 1909 in the name of Gulzari Mal, while F and G are lists of assets and liabilities respectively of a business carried on since 1931 in the name Bhagwan Sahai Jagannath Prasad. These items were all included by the Chief Court's decree.

The property which both Courts in India held liable to partition consisted of eight items of house property in List A, of which two are at Rajwara and the rest in Partabgarh ; four of zemindary property (List B) ; the assets of a business carried on since 1908 in the name Gobardhan Das Ram Gopal (List C) ; and of another business subsidiary to it carried on since 1926 in the name of Ram Gopal Bhuru Mal (List D).

The appellant Bhuru Mal has throughout resisted any decree for partition, maintaining that the suit should fail altogether ; and at the trial Gulzari Mal supported this contention. The plaintiffs and Bhuru Mal brought separate appeals to the Chief Court, the plaintiffs' appeal succeeding and that of Bhuru Mal being dismissed. These appeals were stoutly contested by their learned advocates, but before the Board no one appeared on behalf of the plaintiffs. Mr. Rewcastle, for the appellant Bhuru Mal, took every care to present his appeal in such a manner as might assist their Lordships to appreciate the plaintiffs' case and the evidence which tells in their favour, and their Lordships express their indebtedness to him for this careful discharge of his duty. The absence of any argument for the plaintiffs, though compensated in great measure by the thoroughness of the judgment delivered in the Chief Court, is the more to be regretted that the evidence upon certain issues is by no means easy to interpret.

To appreciate the matters in issue it is necessary to refer to the history of this Marwari family, of which the pedigree table gives some particulars. Their place of origin or " native village " was Rajwara in the State of Alwar. Gobardhan went from Rajwara to Macandrewganj at some date which the Chief Court fix as between 1874 and 1879. Having set up a business or shop—mainly it would seem in piece-goods—he sent in 1879 for his nephew Tota Ram, who was then eleven years old, and a few years afterwards for Ram Gopal, who is said to have been about nine. These boys—the only son of one brother and the eldest son of the other—lived with Gobardhan and were engaged with him in the conduct of the business until his death in 1903. By this time Tota Ram would be about thirty-five and Ram Gopal about twenty-six, though these figures cannot be taken as accurate. The business flourished under the name and style of Gobardhan Das Tota Ram. When Gobardhan died, these two nephews continued living with his widow, but Tota Ram died in 1905 by which his eldest son Onkar Nath had been for a year or two working in the shop. In 1907 the widow died and in 1908 Gulzari Mal came to Macandrewganj and was given money and cloth by his elder brother Ram Gopal to set up a shop in his own name. This is the shop mentioned in List E. Later on, in 1917, he bought himself—as he says out of his own monies—the house which is item 2 in List A.

In August, 1908, Onkar Nath and Ram Gopal divided the business assets of the firm of Gobardhan Das Tota Ram and made two separate businesses out of it—one carried on thenceforward by Onkar Nath under the old name of Gobardhan Das Tota Ram, the other by Ram Gopal under the name Gobardhan Das Ram Gopal. The division was made, nominally at least, as between Onkar Nath and Ram Gopal as individuals but this, of course, is not conclusive : as Onkar Nath could not very well have any other or better right than his brother Shambhu Nath the division may have been intended as a division between the branches of Kishen Sahai and Bhagwan Sahai, both of whom it may be noted were then living. If once the persons entitled to the business of Gobardhan Das Tota Ram can be ascertained the character of this partition will become apparent, but of itself the partition throws but an uncertain light upon the question as to the persons entitled. In 1909 Bhagwan Sahai died. In 1912 there was a partition award in a suit between Onkar Nath and Ram Gopal as to some assets of the old business of Gobardhan Das Tota Ram which had not been divided in 1908. It was held that Rs. 3,000 had been given to Kishen Sahai "for expenses" and that Gobardhan's one-third share in the *haveli* at Rajwara was divisible between "the parties" in equal shares. Kishen Sahai died in 1915.

The plaintiff Jagannath had come to Macandrewganj from Rajwara in 1911, after his father's death. He was then about nine years old and he lived with his elder brother Ram Gopal under whom the business of Gobardhan Das Ram Gopal had flourished, since in 1908 the old business had been divided into two. Jagannath's beginnings as a business man make a complicated and disputed story. He had from 1926 a share in a *sarafa*, or gold and silver, shop with Ram Gopal and one Hira Lall, and from 1928 a share with the same persons in a grain shop. From 1920 he had a cloth shop jointly with Hira Lall. In 1930 he bought himself the house (item 3 in List A) with Rs. 2,000 supplied to him by Ram Gopal. In March, 1931, by a transaction of which there is written evidence, both Hira Lall and Jagannath gave up all interest in the grain business to Ram Gopal, who undertook to pay its debts. Hira Lall took a half share in the *sarafa* shop with Ram Gopal owning the other half share. Jagannath took the cloth shop as his own, naming it Bhagwan Sahai Jagannath, which is the shop whose assets and liabilities are set forth in Lists F and G. At the time of this transaction, Jagannath gave a written acknowledgment of liability dated 22nd March, 1901, for Rs. 3,557-15-6 to Gobardhan Das Ram Gopal in respect of the Rs. 2,000 given him to buy the house and for the debts of the cloth shop. Two days later he gave another acknowledgment or promissory note for Rs. 1,800 mostly for money paid to Hira Lall as profits of the gold and silver shop, but some three hundred rupees seem to have been taken for buying stock for his new firm Bhagwan Sahai Jagannath. In September, 1932, Ram Gopal died and the first defendant, Bhuru Mal, succeeded to the management of the firm Gobardhan Das Ram Gopal. He seems to have been on bad terms with Jagannath, and whereas Gulzari Mal's debt to Ram Gopal or the firm of Gobardhan Das Ram Gopal was forgiven, Jagannath was sued on the promissory notes already mentioned. On May 9, 1933, a decree was obtained against Jagannath notwithstanding his attempt to set up in defence that Gobardhan Das Ram Gopal was a joint family business and that the advances referred to in the promissory notes were made to him as a member of the joint family. This defence was not entertained in view of section 92 of the Indian Evidence Act, as it was held to contradict or vary the promissory note. The decision is said to have been the cause of the present suit which was filed in August, 1933.

Now the plaintiffs say, and the Chief Court have accepted their contention, that all these businesses—*sarafa* shop, grain shop, cloth shop—whether in the name of Ram Gopal, Gulzari Mal or Jagannath—were set up by funds obtained from Gobardhan Das Ram Gopal, that the latter was the joint family property of Bhagwan Sahai's branch, and that all the businesses to which it gave rise were likewise joint, as well as all the house property and other assets which were acquired out of its profits, even if certain items were occupied or enjoyed by individual members.

If the original business carried on as Gobardhan Das Tota Ram was not the joint family property of Gobardhan and his brothers but the sole property of Gobardhan, then on his widow's death in 1907 his brothers took it by inheritance in equal shares and neither brother disposed of his half share. On either view therefore it is said the partition of 1908 having been accepted by all concerned the firm of Gobardhan Das Ram Gopal belongs as joint property to Bhagwan Sahai's branch. In this way the plaintiffs sought and have obtained a decree for one-third share of all the assets scheduled to their plaint.

The appellant Bhuru Mal sets up the case that Gobardhan's original business was his sole property and so remained at his death, but that Onkar Nath and Ram Gopal, though without any right therein, divided it between themselves as two individual trespassers. This means that Onkar Nath was appropriating without objection the property of his own grandfather and Ram Gopal of his own father, to say nothing of the expectations of their younger brothers. This hypothesis is plainly one to which recourse can only be had after every more reasonable and probable interpretation of the facts has been shown to be impossible. Both Courts in India have negatived it and in their Lordships' opinion it may safely be rejected. The appellant at the trial maintained that an oral will had been made by Gobardhan in favour of Onkar Nath and Ram Gopal, but this case was abandoned in the Chief Court.

The view of the learned trial Judge was that there is no proof that Gobardhan's original business was established with the aid of any property belonging to the family at Rajwara and that there is no proof that he ever so dealt with this business or its income as to make it joint family property. But that before his death in 1903 he had taken in as equal partners with himself both Tota Ram, whose name was part of the name and style of the business, and also Ram Gopal. If so, when Gobardhan died his one-third share went to his widow for a woman's limited interest and on her death it went to his two brothers in equal shares—that is to say, a one-sixth interest went to each brother. On this footing it would not seem to be unnatural that after the widow's death a partition should be made between Onkar Nath and Ram Gopal dividing the old firm into two, each of them to carry on a business which was mainly his own but in which his father, or other members of his own branch, had a one-third interest. The learned trial Judge considered that neither the houses which were bought by Gulzari Mal and Jagannath nor their business (mentioned in Lists E, F and G) were shown to be joint property by showing that Ram Gopal advanced money to his younger brothers to help them to set up for themselves. Hence he excluded these from the partition—all the more carefully that in the business of Jagannath—Bhagwan Sahai Jagannath—the debts loom as large as the assets. But the learned Judge would appear to have made some miscalculation of the plaintiffs' share, when framing his decree upon this basis, for he declared their share in the assets of Gobardhan Das Ram Gopal to be one-eighteenth whereas it should be one-ninth; the plaintiffs being entitled to a third of the one-third interest which became Bhagwan Sahai's in the new business of Gobardhan Das Ram Gopal as set up in 1908.

The first question to be considered is whether the Chief Court were right in reversing the trial Judge's finding that it was not proved that the business carried on at Macandrewganj by Gobardhan under the style Gobardhan Das Tota Ram belonged to the joint family—that is to say, to Moti Ram's descendants. On this their Lordships would premise that though a business, if it belong to a Hindu joint family, is an item of joint family property, special considerations apply to the question whether or not a business belongs to the family or the individual member who carries it on. If it be a joint family business, then all the members of the family are liable for its debts upon the terms and to the extent laid down by the Hindu Law. Whether or not it can be said that if a joint family is possessed of some joint property, there is a presumption that any property in the hands of an individual member is not his separate individual property but joint property, no such presumption can be applied to a business. Lord Buckmaster delivering the judgment

of the Board in *K. L. S. V. E. Annamalai Chetty* v. *K. L. S. V. E. Subramanian Chetty*[1] put the law thus :—

"A member of a joint undivided family can make separate acquisition of property for his own benefit and, unless it can be shown that the business grew from joint family property, or that the earnings were blended with joint family estate, they remain free and separate."

In the present case very little is known as to how and when the business of Gobardhan was begun, and it becomes all important to distinguish between matters that can readily be imagined and matters which the evidence establishes. The family dwelling-house at Rajwara is described as a *haveli*, and Gobardhan left it for Macandrewganj at some time between 1874 and 1879. There is no evidence that the *haveli* was ever mortgaged or that in 1874 there was a family business at Rajwara, though Gobardhan's brothers are shown to have had a business in groceries and money-lending by 1898 if not before. The Chief Court would appear to think that these bald facts render it probable that there were family resources out of which grew the business both at Macandrewganj and Rajwara, but their Lordships agree with the trial Judge in thinking that by themselves they leave the means whereby Gobardhan started business completely in the dark. Had his efforts proved unsuccessful and debts accumulated in Macandrewganj his brothers could hardly have been called upon to pay his debts upon proof that at Rajwara the family dwelling-house was more than a cottage and that they were making their living by carrying on a grocer's shop. It is not irrelevant to reflect how many times businesses of substantial size have arisen not merely from small beginnings but by the activity of an energetic man wholly without capital, content to begin selling goods for others and in due course obtaining credit for small transactions on his own account. Their Lordships are unable to see that the Chief Court have made good their criticism of the learned trial Judge that he has misdirected himself in law as regards nucleus of joint property. On the contrary they think that he correctly treated the question whether Gobardhan's business was begun or carried on with the assistance of joint family property as a question of fact upon which the burden of proof lay upon the plaintiffs who claim a share in the business. They think the Chief Court misapprehended and misapplied the case of *Rampershad Tewarry* v. *Sheochurn Doss*[2], in coming to the conclusion that they were not debarred from "casting the burden of proving that the business was separate in its inception upon the defendant who asserts it". In that case each of five brothers was actively engaged in the management of a branch of the same bank. They constituted a joint Hindu family, and by a partition deed it was clear that they all had an equal interest and that all the branches were one business, accounting together as one business. There was no evidence of an agreement of partnership and, as jointness was undeniable, it was held that the business belonged to the five as joint family property. In these circumstances the conclusion could not be resisted merely on the ground of the obscurity which surrounded the beginnings of the business and the means by which the brother Deeranath had first laid its foundations. In the present case, as in that case, jointness may be proved by evidence that the business was carried on as a family business, by proof that the profits were treated as joint family property being brought to one account or divided among the members. It *might* be, for example, that Tota Ram and Ram Gopal were engaged in the business of Gobardhan Das Tota Ram as representing their respective branches. It *might* be that profit and loss from all the businesses carried on by any member or members were brought into one account or that they had all been dealt with by a partnership deed which made clear that all the members had an interest. But these are all matters which stand in need of proof and, until they are established as facts, the present case does not begin to be comparable to the case relied on by the Chief Court. The similarity of the two cases on the facts is illusory. Mr. Mayne in a well-known passage has referred to the difficulty which arises from attempting to lay down an abstract proposition of law which will govern every case however different its facts, and has observed that the amount of evidence necessary to shift upon the other side the burden of dis-

1. (1928) 56 M.L.J. 435 : 27 A.L.J. 9 (P.C.). 2. (1866) 10 M.I.A. 490.

placing it might be very small but would necessarily vary according to the facts of each case (Hindu Law and Usage, 6th Ed., section 291, pp. 356-8). The learned Judges of the Chief Court were right to bear in mind the necessity for taking the various considerations together and having regard to their cumulative effect. But unless in the present case the initial onus is placed squarely upon the plaintiffs the evidence is not properly weighed.

Upon the question of fact whether it is proved that Gobardhan Das Tota Ram was the business of the joint family their Lordships have reached the same conclusion as the learned trial Judge. They think that the Chief Court show no sufficient reason for disagreeing with his finding that there was a partition of the Rajwara business in 1898; and that this fact affords some evidence that the business at Macandrewganj was not joint property, since Gobardhan got no share in the Rajwara business and the Macandrewganj business was not partitioned on that occasion. But their Lordships look in vain for evidence which establishes that the latter business was ever family property. There is no direct proof that it was so conducted by Gobardhan in his lifetime or that its profits and those of the Rajwara business were ever disposed of or accounted for as joint family property. There is the fact—explicable in more ways than one—that Tota Ram and Ram Gopal were taken into the business; but on Gobardhan's death there was no partition in his widow's lifetime, and when the partition was made it was not made as if the business belonged to the joint family. There is evidence, from the oldest accounts now extant, of a number of small deposits credited to "Kishen Bhagwan"—amounting in the years 1881 to 1883 to Rs. 262 and remittances made amounting to Rs. 381 during the same period. Similar figures from 1885 to 1890 are: deposits Rs. 168, remittances Rs. 380. In 1903 there are other entries as to money "sent home," usually Rs. 100 at a time. The trial Judge thought that some of these figures referred to deposits of money made with Gobardhan by his brothers and that others represented moneys sent home to their family by Tota Ram and Ram Gopal. The Chief Court lay stress upon these entries as showing what they call an interchange of capital between the business in Macandrewganj and Rajwara. It is not quite clear what are the circumstances in which or the purpose for which two businesses "interchange capital"—the operation not being one with which their Lordships can claim to be familiar. But it can hardly be right in any case to hand over a share of the business which now exists on the strength of small transactions of ancient date of which the nature cannot now be definitely ascertained. If the meaning and purpose of these transactions is to be guessed at in the absence of all evidence except the entries themselves, the trial Judge's interpretation seems the more probable as well as the more cautious.

Coming to comparatively recent years and to the business of Gobardhan Das Ram Gopal, there is the fact and character of the partition of 1908 and of the additional proceedings taken in 1911-2. But these again are ambiguous to say the least since the problem has to be resolved whether Onkar and Ram Gopal were acting and, if so, how far, as representing their respective branches of the family. To throw light upon the question whether the business of Gobardhan Das Ram Gopal belonged to all the members of Bhagwan's branch we have little in the proved conduct of the parties which can be treated as significant. As regards Jagannath's early years it seems important to take care that adverse inferences should not be made against Ram Gopal merely on proof that he treated his younger brothers with ordinary kindness, supporting them when they were not earning, helping them to begin making a living for themselves, seeing to their marriage and so forth.

The Chief Court have observed that the documentary evidence after 1919 points to separation and that Jagannath was behaving and being treated as a separated member in many respects. They quote his own evidence that his rent, living expenses and the educational expenses of his son were all met from the cloth shop Hira Lall Jagannath, never coming into the accounts of Gobardhan Das Ram Gopal; and that money due to that firm was shown as such and paid with interest. It is

impossible to suggest that the businesses which are now claimed to be joint are proved ever to have accounted together so as to show or even to suggest that they were the common property of the same owners.

The Chief Court in an important passage of their judgment observe:

"There can be no doubt that the senior and managing member of a joint Hindu family being in control of the family funds sometimes usurps to himself a position to which he is really not entitled and imposes upon the junior members conditions to which they could not be compelled to submit by law . . . . It is also certain that joint families frequently open a business in the names of one or more members only and sometimes associate an outsider as a partner as well. This gives a misleading appearance of partnership between the members of the joint family where no partnership in the proper sense of the word exists. It also introduces a fictitious and therefore misleading element into the keeping of accounts as between the different firms."

These observations appear to their Lordships to be both true and important and they account for much of the difficulty of such a case as the present. They show the need for caution before attributing any conclusive force to mere debits and credits as negativing the possibility of different businesses having a common ownership. When positive *prima facie* proof of jointness has been given such considerations may render very harmless entries which otherwise might appear to disprove jointness. But they do not provide a formula whereby jointness can be proved and their Lordships would hope that no presumption can readily be made that the conduct of a managing member is contrary to his duty towards a junior member or that the acquiescence of the junior would readily be obtained. Moreover there is a limit to the force of such consideration as the Chief Court have in mind. When in suit No. 60 of 1932 Jagannath was sued on the promissory notes of March, 1931, he set up no plea of duress or undue influence though he claimed that there was no real loan or liability since he was a member of the family which owned the firm of Gobardhan Das Ram Gopal. Decree was passed against him for the sums which he had taken to buy the house in which he lives, to stock his cloth shop and to pay off Hira Lall in respect of the *sarafa* business. Yet the Chief Court in the present case have held at his instance that this house is joint property, as well as the cloth shop with its liabilities. Their Lordships cannot think this right. A joint family can hardly be supposed to say to a junior member by the mouth of its managing member " We will lend you this money to buy a house on the terms that you repay the money and we get the house as well." Or " We will give you money to buy stock for our cloth shop but you will repay the money and account for the cloth in the usual way." It is readily intelligible however that a junior member wanting, for example, to buy a house should be told that he can have the money as a loan though the family does not want to invest in another house and cannot afford to let him have the money as an ordinary family expense (that is, to be received without any liability to account and by way of enjoyment of his share in the joint property) or as a distribution of profits from a business in which he is a joint proprietor. In like manner a junior member minded to commence a business might well be told that the family do not want to engage in the particular venture proposed or to be responsible for the debts incurred in connection therewith, but that a certain sum could be provided on loan to enable the venture to be carried on by the junior on his own account. These instances may serve to show how wrong it would be to jump to the conclusion that what appears to be a loan is not in truth a loan because there is a joint business or some other joint property.

In such cases the junior member upon a partition will be entitled to his share in the assets of the joint business which made the loan including the debt due from or money recovered from himself. There is no more paradox in this than already lies in the fact of the family or firm having made him a loan. The Chief Court treat Gulzari Mal's house and business, contrary to his evidence, in the same way as they treat Jagannath's, saying that " the capital was given him under the guise of loans bearing interest ", but though repayment was not enforced by suit in his case there seems to be no sufficient reason for holding that the transaction was not what it professed to be. Neither in the case of Gulzari Mal nor of Jagannath is it established

to their Lordships' satisfaction that his interest in the business he carried on was not his own but belonged to the joint family.

The question whether Tota Ram and Ram Gopal had acquired an interest in the business of Gobardhan Das Tota Ram by the time Gobardhan died in 1903 is the next matter for consideration. Here, too, their Lordships think that there is more to be said for the view of the trial Judge than for the contention that it belonged wholly to Gobardhan. The name of Tota Ram was part of the firm's name and he had worked in it for about twenty-four years—from 1879 to 1903. His minority in the first year or two has little to do with the matter, and in 1903 Ram Gopal and he were clearly on an equal footing. There is no partition during the widow's lifetime, but when she died in 1907 the partition is carried out between Onkar Nath, who was working in the firm, and Ram Gopal. Their Lordships think it clear enough that this partition was acquiesced in by all concerned and that it would be absurd to suppose that Onkar's brother Shambu or Ram Gopal's father and brothers knew nothing about the matter or could now object to what was done in 1908. The question is whether that partition is to be read as a partition of property which belonged wholly in law to Gobardhan's two brothers as self-acquired property or of property in which these two had between them only a one-third share. The division between Onkar and Ram Gopal into two firms, and the beginning of the firm of Gobardhan Das Ram Gopal is very much more probable on the view taken by the trial Judge, and their Lordships see no reason to dissent from his conclusion, though the evidence now available is both scant and indirect.

Their Lordships are of opinion that neither the houses (List A, items 2 and 3) nor the businesses (Lists E, F and G) of Gulzari Mal and Jagannath are shown to be joint property and that they were rightly excluded from the trial Court's decree. In List A, item 10, which is included in that decree, is really one-half of Gobardhan's original one-third share in the *haveli* at Rajwara. This one-third share was divided into two one-sixth shares by the partition suit No. 12 of 1912 which was decreed on February 28, 1912, on the terms of Exhibits A 54 and A 55. Of one of these sixths the plaintiffs are entitled to a third. This no doubt amounts to one-eighteenth share in the whole, but the *haveli* is not being divided into eighteenths by the present suit, to which only Bhagwan Sahai's descendants are parties. By the same partition it was found that Gobardhan had owned two shops in Rajwara, and one of these was given to Ram Gopal. That is item No. 11 in List A, and it falls to be divided into thirds as the trial Court's decree directed. Their Lordships have no difficulty in holding that the partition of 1908 between Onkar and Ram Gopal was binding on Gobardhan's brothers and that their branches cannot now reopen it. In the items in List A numbered 1 and 4 to 9, and in all the items in Lists B, C and D the share of the plaintiffs should be declared to be one-ninth and not one-eighteenth. Bhuru Mal's defence of limitation has been rejected by both Courts in India, and as their Lordships do not consider that ouster or exclusion for twelve or even six years before this suit has been established they concur in rejecting that defence. In their opinion Article 106 of the Schedule to the Limitation Act, 1908, has no application to this case, which is governed by Article 127.

Their Lordships will humbly advise His Majesty that this appeal should be allowed; that the decree of the Chief Court dated September 29, 1937, in First Civil Appeal No. 46 of 1935 be set aside and the decree in Final Civil Appeal No. 17 of 1935 affirmed; that the decree of the Subordinate Judge dated December 22, 1934, be restored with the following modifications, namely: (1) that the plaintiffs be declared to be entitled in respect of item 10 of List A to the plaint, being the *haveli* at Rajwara, to a one-third share in the one-sixth share given to Ram Gopal by Exhibits A 54 and A 55; (2) that the plaintiffs be declared to have a one-ninth interest in the items numbered 1 and 4 to 9 inclusive of List A and in all the items comprised in Lists B, C and D. The order as to costs made by the trial Court will not be disturbed nor the Chief Court's order as to the costs of Bhuru Mal's appeal, being First Civil Appeal No. 17 of 1935, to that Court. But the plaintiffs must pay

Bhuru Mal's costs in the Court of their appeal No. 46 of 1935 and his costs of the present appeal to His Majesty.

Barrow Rogers and Nevill—Solicitors for the appellant.

K.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

Syed Abdul Wajid Sahib and others .. *Appellants** (*Defts.*)

v.

Oosman Abdul Rubb .. *Respondent* (*Plff.*).

Trusts Act (II of 1882), sections 23, 94 and 95—Mahomedan co-heirs—Management of minor's estate by elder brother—Death of de facto *guardian—Suit against legal representatives for account—Liability to pay interest on sums held by guardian.*

A Mahomedan died in 1929 leaving behind him three sons and two daughters. The plaintiff who was the youngest of the sons was then a minor, and his eldest brother acted as his guardian and took charge of his share in the estate after the same was partitioned among the several heirs. The guardian died in 1932 and after the respondent came of age he instituted a suit against the legal representatives of his guardian for recovery of the amount due to him in respect of the management of his estate. The defendants contested *inter alia* the liability to pay interest on the plaintiff's share of the liquid assets during the management by the deceased guardian.

Held, that the brother of the plaintiff who acted as his *de facto* guardian had placed himself in a fiduciary position, that he was liable to pay interest on the liquid assets held by him for the minor by virtue of section 23 read with sections 94 and 95 of the Trusts Act and that his estate should be rendered liable for the amount of interest from the date of the death of the guardian.

Appeal against the decree and judgment of the Honourable Mr. Justice Somayya, dated 20th December, 1940 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 4 of 1936.

K. Bhashyam and *U. Lakshmanna* for Appellants.

A. Viswanatha Aiyar for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—This appeal arises out of a suit filed by the respondent on the original side of this Court to recover from the appellants, who were sued as the legal representatives of his deceased brother Abdul Wahid, the amount due to him in respect of the management of his estate. The suit was tried by Somayya, J., who granted the plaintiff a decree for Rs. 29,348-14-2. The appellants object to the decree only in respect of two of the sums which make up the aggregate of Rs. 29,348-14-2. The first objection is with regard to a sum of Rs. 2,730-1-0 allowed as a one-fourth share of a fixed deposit and the second objection is with regard to a sum of Rs. 9,760, allowed in respect of interest from the date of death of Abdul Wahid, which took place in the month of September, 1932.

The respondent is the youngest son of the late Dr. N. Mohamed Oosman Sahib of Madras. Dr. Mohamed Oosman died on the 10th April, 1929. He was survived by three sons and two daughters. The respondent was then a minor. His eldest brother Abdul Wahid acted as the respondent's guardian and took charge and managed his share of their father's estate, which was partitioned amongst the sons and daughters on the 26th June, 1929. The total value of the estate was Rs. 4,00,000. It included immovable properties in Madras and Trichinopoly. The respondent was allotted as his share certain lands and houses in Trichinopoly, a house in Madras and Rs. 5,100 in cash. Each son and each daughter received as part of his or her share immovable property and the rest in cash. After the father's death the respondent lived with his eldest brother in Madras until the month of April, 1931. Abdul Wahid then moved to Trichinopoly, where he was taken ill. He moved to his father-in-law's house in Mysore in June, 1932 and died in Bangalore in the following September. Abdul Wahid was survived by his son, the second appellant, and his wife the third appellant. The first appellant is his father-in-law and he has been made a party because he has been appointed the guardian of the property

* O. S. A. No. 20 of 1941. 24th November, 1942.

of the second appellant. The respondent attained his majority on the 5th January, 1933 and filed this suit on the 19th December, 1935.

It is not disputed that upto his death Abdul Wahid remained in possession of the respondent's share of his father's estate. The appellants put the respondent to full proof of his case. They went so far as to deny that Abdul Wahid had acted as the respondent's guardian. That attitude has now been abandoned. It is accepted that Abdul Wahid was the *de facto* guardian of the respondent and as such was in a fiduciary position.

Before his death the father had placed a sum of money with the Indian Bank on fixed deposit. The deposit was not payable until the 1st August, 1930. On that date Abdul Wahid was paid the amount which with interest came to Rs. 10,920-4-0. The bank insisted on Abdul Wahid giving a receipt for one-fourth of this sum, Rs. 2,730-1-0, on behalf of the respondent who was still a minor. This is the amount which forms the subject-matter of the appellant's first objection. The bank addressed the pay order for the Rs. 2,730-1-0 to the respondent who was described as a minor "represented by his eldest brother and guardian Oosman Abdul Wahid Esqr." The receipt was signed by Abdul Wahid as guardian. The case for the appellants is that as the respondent was allotted properties worth Rs. 1,00,000 on partition it must be taken that these included his share in the fixed deposit with the Indian Bank. This contention cannot be accepted. In the accounts relating to the partition there is no reference to this fixed deposit and as the receipt for one-fourth of the sum was taken in the name of the respondent, the only reasonable conclusion is that the division of the sum placed on fixed deposit was left in abeyance until it actually became payable. The appellants have led no evidence to show that the other heirs gave up their shares in this sum and there has been no attempt whatever to prove that this deposit was included in the properties partitioned. The second son Abdul Huq is dead, but the two daughters are alive. For these reasons we consider that the learned Judge was fully justified in charging the Rs. 2,730-1-0 against the estate of Abdul Wahid.

With regard to the second objection, the appellants contend that interest cannot in law be charged against the estate and therefore the whole of the Rs. 9,670 awarded by the learned Judge in respect of interest should be disallowed. The answer to this question is governed by the provisions of the Indian Trusts Act. Abdul Wahid was not a trustee within the meaning of section 3 of the Indian Trusts Act, but came within section 94 of the Act. That section says that where there is no trust, but the person having possession of the property has not the whole beneficial interest therein, he must hold the property for the benefit of the persons having such interest, and illustration (*b*) to the section says that if *A* assumes the character of a trustee for *B*, and under colour of the trust receives certain money, *B* may compel him to account for it. Section 95 says that a person holding property in accordance with any of the "preceding" sections of the Chapter (sections 80 to 94) must, so far as may be, perform the same duties, and is subject, so far as may be, to the same liabilities and disabilities, as if he were a trustee of the property for the person for whose benefit he holds it. Therefore, as Abdul Wahid was the *de facto* guardian of the plaintiff and had assumed management of his properties, he was under all the liabilities and disabilities of a trustee.

Section 20 says that where the trust property consists of money and cannot be applied immediately or at an early date to the purposes of the trust, the trustee is bound to invest the money. Section 23 makes a trustee liable for a breach of trust and indicates the circumstances under which a trustee committing a breach of trust is liable to pay interest. Clause (*e*) of that section says that where the breach consists in failure to invest trust money and to accumulate the interest or dividends thereon, he is liable to account for compound interest with half yearly rests at six per cent. per annum unless the Court otherwise directs. As Abdul Wahid was in the position of a trustee, it was his duty to invest the Rs. 2,730-1-0 which he received on the 1st August, 1930, because he could not pay it over to the respondent

until he became a major. On the 31st July, 1931, he received Rs. 6,862-4-6 belonging to the minor. This represented a sum placed on fixed deposit two years before and the interest which had accrued thereon. In addition he collected and accumulated the rents and profits of the minor's properties. These sums should have been invested in the circumstances. As Abdul Wahid failed in his duty, he was liable to pay interest under section 23 of the Trusts Act read with sections 94 and 95.

The Rs. 9,760 represents interest on the total sum in the hands of Abdul Wahid at his death in September, 1932, from that date. The respondent should have in fact been allowed interest in respect of the Rs. 2,730-1-0 from the 1st August, 1930, interest on the Rs. 6,862-4-6 from the 31st July, 1931 and interest on the accumulations of mesne profits from earlier dates. The respondent has not objected to the award of interest from the date of the death of Abdul Wahid and the appellants naturally do not wish to have it calculated from the proper dates. In these circumstances the decision of the learned Judge awarding interest from the date of the death of Abdul Wahid must stand.

The result is that the appeal fails and must be dismissed with costs.

B. V. V. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Oruganti Venkatramiah Chetti .. *Petitioner** (*Appellant*)

v.

Venkataswami Chetti and others .. *Respondents* (*Respondents*).

Civil Procedure Code (V of 1908), Order 9, rule 9 and Order 43—Dismissal of application to set aside order of dismissal for default, of rent suits—Appealability—Madras Estates Land Act (I of 1908), sections 189 and 192 (as amended)—Scope and applicability.

A batch of rent suits was dismissed both on the ground that the plaintiff had not taken out process to the defendants and also on the ground that neither the plaintiff nor his pleader was present. An application to set aside that order was dismissed. On the question of appealability of the order,

Held, the wording of the Madras Estates Land Act, section 192 (as amended) does not suggest that the provisions of the Civil Procedure Code can be applied only with regard to purely procedural matters and there is nothing in that section even when read with section 189 which suggests that an application under Order 9 of the Code would be precluded. Accordingly an appeal would lie from the order dismissing the application to set aside the order of dismissal.

Petitions under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the decrees of the District Court of Chittoor dated 11th October, 1941 and passed in C. M. A. No. 38 of 1941, etc.

S. A. Seshadri Aiyangar for Petitioner.

R. Venkatasubba Rao and *M. Balachandrudu* for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiff in a batch of rent suits was called upon to pay process for the service of a copy of his amended plaint on the defendants. He was given time to do so ; and on the day to which the matter was adjourned, which was also the day to which the suits were adjourned, neither the plaintiff nor his pleader was present. The suits were thereupon dismissed both on the ground that the plaintiff had not taken out process to the defendants and also on the ground that neither the plaintiff nor his pleader was present. An application was put in to set aside that order and it was dismissed. The plaintiff then approached the District Court in appeal ; and the learned District Judge dismissed the appeals on the preliminary ground that no appeal lay. Hence these revision petitions.

The learned District Judge referred to the provisions of sections 189 and 192 of the Madras Estates Land Act and pointed out that before the recent amendment, Order 43 of the Code of Civil Procedure did not apply to suits under section 189 of the Estates Land Act. He thought that despite the extensive amendment made to section 192 there was no change in the general principle. Section 189 sets out by reference to the schedule the class of suits and applications which may be heard by a Revenue Court ; and the same schedule provides the remedy to persons aggrieved

* C. R. P. Nos. 477 to 485 of 1942. 3rd November, 1942.

by the decisions thereon. In some cases no appeal is provided at all; in most cases appeals are permitted to some specified authority. So it is true to say that no appeal lies except under section 189 (2)—read with the Schedule—against any decree passed in any suit or any order passed on an application referred to in section 189 (1); but the Schedule does not purport to deal with the remedy of parties aggrieved by any orders on applications not specified in section 189 (1). To argue consistently from the limitations of the Schedule one would have to say, as indeed Mr. Venkatasubba Rao does say, that not merely does an appeal not lie under Order 43 of the Code but also that no application lies under Order 9, rule 9; because an application under Order 9; rule 9 is not mentioned in section 189 (1). If such an application is permissible then there would seem to be no reason why an appeal against an order made on it, which is permitted by Order 43, should not lie.

In support of the learned Judge's finding, the learned advocate for the respondent relies on some dicta of Madhavan Nair, J., in *Ramakrishnayya* v. *Naganna*[1], who was considering whether a claim suit was permissible in revenue matters. He points out that a claim suit finds no mention in section 189 (1) and that section 192 cannot enlarge the scope of section 189, which lays down what suits may be tried by a Revenue Court. I respectfully agree that section 192 could not have been intended to enlarge the scope of the jurisdiction of Revenue Courts and to permit them to try suits not mentioned in section 189, merely because in similar circumstances in an ordinary civil litigation a claim suit would be permitted. It however seems to me that if a Court has jurisdiction to try a suit, it has jurisdiction to pass orders on all matters incidental to the hearing of that suit, the only limitation to the application of the general principles of the Code of Civil Procedure being that the Court should not act in any way inconsistent with any of the provisions of the Schedule. For example, the Estates Land Act contains a body of procedure with regard to execution; and so a Revenue Court cannot apply the procedure laid down in the Code of Civil Procedure, which must almost necessarily conflict with the procedure laid down in the Estates Land Act. So Krishnaswami Ayyangar, J., in *Gopalakrishnayya* v. *Narasimha Rao*[2] has held that an application to set aside a sale under Order 21, rule 90, Civil Procedure Code, could not be filed. For the same reason, Patanjali Sastri, J., in *Suryanarayana* v. *Sree Rajah Sobhanadri Apparao Bahadur*[3] has held that an application under Order 21, rule 92 of the Code could not be made. If, however, no applications can be made to a Revenue Court except those referred to in the Schedule it would mean that a Revenue Court has no authority to hear any interlocutory applications. If it has such a power, as indeed we must presume it has, then it is only by reference to the Code of Civil Procedure that we can decide what interlocutory or incidental applications the Court can hear. It is true that there are certain dicta in the cases quoted above which suggest that section 192 merely lays down the procedure to be adopted; but the wording of section 192 does not suggest that the provisions of the Civil Procedure Code can be applied only with regard to purely procedural matters. We know that where somewhat similar wording is found in other Acts applications under Order 9 have been held to be permissible; and I do not find anything in section 192, even when read with section 189, which suggests that an application under Order 9 would be precluded. If it is not, it would seem to follow that an appeal would lie also. The Schedule restricting appeals deals merely with applications also to be found in the Schedule. I am therefore of the opinion that an appeal did lie to the District Judge.

It is contended that it is unnecessary to give a definite finding on this point; because if the suit was dismissed not only under Order 9, rule 8 but also because the plaintiff had not taken out process to the defendants, then the order passed being one under Order 9, rules 2 and 3 also is not appealable and therefore the first appellate Court could not interfere with the order of dismissal. It however seems that the process was ordered for the service of an amendment of the plaint after remand—or at any rate the order was made long after the defendants had put in appearance.

1. (1933) 65 M.L.J. 775.
2. (1939) 2 M.L.J. 120.
3. (1940) 2 M.L.J. 585.

It is therefore very doubtful whether the suit was really dismissed under Order 9, rules 2 and 3. However, as the actual facts are not very clear from the records that have been pointed out to me, it is left open for the District Judge upon remand to dismiss the appeals on some ground other than the preliminary one that he has no jurisdiction under Order 43. I do not think it necessarily follows that because the suits were dismissed not only for want of personal appearance but also because of an order which was not appealable, the dismissal would have to stand. If the appellate Court is of opinion that the plaintiff had sufficiently accounted for his inability to be present on the date of hearing, it might follow that the plaintiff would be entitled to be heard by the trial Judge on the other question whether his suits should be dismissed on the ground of his having failed to take out process. On these points, I however prefer to express no opinion.

The revision petitions are allowed and the first appeals remanded for disposal. The costs of these petitions will be provided for in the order of the District Judge. A consolidated Advocate's fee of Rs. 100 is allowed. A certificate will issue for the refund of the court-fees paid on these petitions.

K.S. ——— *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUPPUSWAMI AYYAR.

Osuri Narayanaswami and others .. *Petitioners** (*Plffs. 1, 3 & 4*)

v.

Savanam Venkataswami and others .. *Respondents* (*Defts. & 2nd Plff.*).

Court-Fees Act (*VII of 1870*), *section 7* (*v*) *and* (*x*) (*a*)—*Contract of sale—Property agreed for sold in lieu of mortgage debt—Suit for specific performance—Mortgage debt liable to scaling down under Madras Act IV of 1938—Valuation for purposes of court-fee—Prayer for possession as against persons not parties to mortgage or contract of sale—Separate court-fee payable.*

The plaintiff had a mortgage right over certain properties and it was arranged that in view of the amount due under the mortgage the suit properties should be conveyed to him, and there was a further clause that in case the properties were not conveyed he would be entitled to recover the money due under the mortgage. Subsequently the Madras Agriculturists' Relief Act was passed and the amount payable to the mortgagee would have, if scaled down, entitled the plaintiff to recover only Rs. 4,000. The mortgagors refused to execute a conveyance, and a suit had to be filed for specific performance of the contract of sale or in the alternative for recovery of the amount due under the mortgage. Certain other persons who were not parties to the mortgage or the contract which was sought to be specifically enforced were impleaded and a prayer for recovery of possession of the properties from them also was made in the plaint. The plaintiff valued the claim at Rs. 4,000 and paid court-fee thereon, although the mortgage amount as at the time of the contract of sale was much larger. An objection having been raised to the valuation and the court-fee paid thereon,

Held, that the claim for specific performance was leviable to court-fee under section 7, clause (*x-a*) of the Court-Fees Act and that court-fee was payable on the amount due under the mortgage on the date of the contract and not on the amount which according to the plaintiff was due on the date of suit.

Madam Pillai v. *Badrakali Ammal*, (1922) 42 M.L.J. 410 : I.L.R. 45 Mad. 612 (F.B.) and *Chaudhri Talib Ali* v. *Mst. Kaniz Fatima Begum*, (1927) I.L.R. 2 Luck. 575, considered.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge of Narasapur, dated 21st October, 1941 and made in O. S. No. 49 of 1940.

P. V. Rajamannar and *K. Subba Rao* for Petitioners.

The Government Pleader (*K. Kuttikrishna Menon*) and *C. V. Dikshitulu* for Respondents.

The Court delivered the following

JUDGMENT.—This is a petition to revise the order of the learned Subordinate Judge of Narasapur directing the plaintiffs to pay additional court-fee on the basis that the claim for specific performance of the contract should be valued at Rs. 24,000 and not at Rs. 4,000 as shown in the plaint.

The plaintiff had a mortgage right over certain properties and it was arranged in 1937 that in view of the amount due under the mortgage the properties which are the subject-matter of the suit should be conveyed to him, and there was a further

* C. R. P. No. 2670 of 1941. 19th November, 1942.

clause that in case the properties are not conveyed he will be entitled to recover the money due under the mortgage. Subsequently the Madras Agriculturists' Relief Act was passed and if the amount payable to the mortgagee was scaled down it entitled the plaintiff to recover only Rs. 4,000. Naturally the mortgagors refused to execute a conveyance, and a suit had to be filed for specific performance of the contract for sale or in the alternative for recovery of the amount due under the mortgage. Certain other persons who were not parties to the mortgage or the contract which was sought to be specifically enforced were impleaded, and a prayer for recovery of possession of the properties from them also was made in the plaint. The plaintiff valued the claim at Rs. 4,000 and paid court-fee thereon.

The court-fee examiner raised an objection to the valuation and stated that separate court-fee should be paid for the relief as against the other defendants who are not parties to the contract or mortgage under section 7, cl. (5) and that with regard to the relief for specific performance of the contract it should be valued at Rs. 24,000, the amount due under the mortgage on the date of the contract sought to be specifically enforced. The learned Subordinate Judge agreed with the court-fee examiner and found that additional court-fee should be paid and directed the same to be paid. It is that order that is sought to be revised.

It was contended that the contract sought to be specifically enforced is not really a contract of sale, as in this case it is only the unliquidated amount payable in respect of the mortgage without the same being ascertained that was stated to be the consideration for the sale. Reliance was placed upon the decisions in *Madam Pillai* v. *Badrakali Ammal*[1] and *Chaudhuri Talib Ali* v. *Mst. Kaniz Fatima Begam*[2]. In the former case the sale was in discharge of a claim for future maintenance; it would not be possible to postulate how long the maintenance holder would live and how much may have to be paid for maintenance. It was therefore considered that the consideration for the transaction was not capable of being ascertained definitely in money and consequently it could not be held to be a sale. The Lucknow case was also a transfer of properties for partial release of a dower debt. In this case the consideration for the conveyance of the properties was the amount due under the mortgage. The amount so due was capable of being ascertained in money, and it is the amount due under the mortgage that will have to be taken as the price agreed to be paid for the conveyance. It is therefore clearly a case of sale, and if it is a case of sale, on the ground that the price was capable of being ascertained in money, it could not be said that the relief is one which is not capable of being valued so as to attract the provisions of Article 17-*b* of Schedule II of the Court-Fees Act. The learned Subordinate Judge was therefore right in finding that the suit for specific performance was governed by section 7, clause (*x-a*) of the Court-Fees Act and directing the plaintiff to pay the same. The Civil Revision Petition is therefore dismissed with costs, two sets.

B.V.V. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Yaddanapudi Pullayya .. *Appellant** (*Petr.*)

v.

Yaddanapudi Venkatasubbamma and others .. *Respondents* (*Respts.*).

Provincial Insolvency Act (V of 1920)—Annulment of adjudication subject to properties continuing to vest in the Official Receiver for one year—Execution proceedings within that period without impleading the Official Receiver—Sale in execution after the expiry of year—Sale if to be set aside.

An order of adjudication was annulled but the properties were directed to continue to vest in the Official Receiver for a further period of one year. Within that year a creditor filed an execution petition without impleading the Official Receiver and took certain preliminary steps. After the period of one year for which the property was ordered to continue to vest in the Official Receiver had expired, the Official Receiver sent a letter to the Court asking it to stay its hands as he intended

---

1. (1922) 42 M.L.J. 410 : I.L.R. 45 Mad. 612 (F.B.).
2. (1927) I.L.R. 2 Luck. 575.

* A. A. A. O. No. 93 of 1941. 9th November, 1942.

applying to the Insolvency Court for an order directing the property to continue to vest in him for some more time. He made such an application to the Insolvency Court, but it was dismissed on the ground that the execution petition was pending and that it would be unfair to order the property to continue to vest with retrospective effect. Then the property was brought to sale and purchased by a third party. On the question whether the sale must be set aside,

Held, though executing creditors had no charge on the land and the Court could not properly give them such a charge at the expense of the other creditors of the insolvent the proceedings in the present case were not void *ab initio* and the sale cannot be set aside except on equitable grounds. Although the procedure adopted was irregular the debtor had nothing to complain of as he had had a fair hearing.

Appeal against the order of the Court of the Subordinate Judge of Guntur, dated 11th July, 1940 and made in A. S. No. 45 of 1939, preferred against the order of the Court of the District Munsiff of Guntur in E. A. No. 2873 of 1936 in O. S. No. 843 of 1928.

M. S. Ramachandra Rao and *D. R. Krishna Rao* for Appellant.

V. Govindarajachari for Respondents.

The Court delivered the following

JUDGMENT.—The appellant was adjudged insolvent; but his adjudication was annulled on the 10th September, 1935. By the same order the property of the appellant was directed to continue to vest in the Official Receiver for a period of one year. Within that year, on the 29th February, 1936, a creditor filed E. P. No. 185 of 1936 without impleading the Official Receiver and took certain preliminary steps. On the 26th September, 1936, after the period for which the property was ordered to continue to vest in the Official Receiver had expired, the Official Receiver sent a letter to the Court asking it to stay its hand as he intended applying to the Insolvency Court for an order directing the property to continue to vest in him for some longer period. He made such an application to the Insolvency Court; but it was dismissed on the ground that the execution petition was pending and that it would be unfair to order the property to continue to vest with retrospective effect. So on the 5th October, 1936, after the property had ceased to vest in the Official Receiver and again vested in the appellant, the property was brought to sale. A third party purchased it for what has been held to be a fair price, and the money now remains in Court for distribution amongst the creditors.

The question is whether the fact that this application was filed during the period that the property vested in the Official Receiver renders the sale, which took place after the property had ceased to vest in the Official Receiver, void or illegal. As the appellant was no longer an insolvent, the bar of section 28 (2) does not apply; but it is argued that as the insolvent was not then the owner of the property, the Official Receiver in whom the property vested, should have been brought on record. I quite agree that he should have been made a party; but the question is whether the sale must be set aside, despite the fact that the appellant was fully heard.

The Judicial Committee, in considering a similar application against an insolvent, held in *Raghunath Das* v. *Sundar Das Khetri*[1] that the sale was void for three reasons. The first was that the judgment-creditors had no charge on the land and the Court could not properly give them such a charge at the expense of the other creditors of the insolvent. The second was that no proper steps had been taken to bring the Official Assignee before the Court and obtain an order binding on him and accordingly he would not be bound by anything which was done; and the third was that the judgment-debtors had at the time of the sale no right, title or interest which could be sold to or vested in a purchaser, and that consequently the respondent acquired no title to the property. The third of these grounds would not here apply; because at the time of the sale the judgment-debtor had full right, title and interest in the property. The second objection too is irrelevant to the present case; because it is not the Official Assignee or one of the creditors who now objects; but the debtor himself, who did have notice. The first objection would apply to this case; but as the proceedings were not void *ab initio*, the sale cannot

1. (1914) 27 M.L.J. 150 : L.R. 41 I.A. 251 : I.L.R. 42 Cal. 72 (P.C.).

be set aside except on equitable grounds which do not exist in the present case. It is true that notice should have gone to the Official Receiver; and as has been said in *Rajagopala Ayyar* v. *Ramanujachari*[1] and in *Gopal Chunder Chatterjee* v. *Gunamoni Dasi*[2] referred to in *Raghunath Das* v. *Sundar Das Khetri*[3], it is notice to the Official Receiver or the Official Assignee that gives the Court jurisdiction to proceed against him. But in the present case we are only concerned with whether the Court can proceed against the judgment-debtor. Although the procedure adopted by the lower Court was irregular the judgment-debtor has nothing to complain of. If the appellant had not been given a fair hearing at an earlier stage because he was not a person interested in the property, he would of course have good ground to have the sale set aside; but no equitable reason exists why the sale should be set aside.

The appeal is dismissed with the costs of the third respondent.

K.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUPPUSWAMI AYYAR.

Minor Vembu Ayyar, adopted son of the late Ramaswami Iyer, by guardian Saminatha Ayyar .. *Petitioner** (*Deft.*)

v.

Subbiah Pillai .. *Respondent* (*Plff.*).

Hindu Law—Minor given in adoption—Promissory note or acknowledgment of debt by natural father or mother—If can bind the minor.

Where a minor has been given away in adoption his natural father cannot be regarded as a *de jure* guardian competent to bind the minor by any promissory note executed by him as guardian nor can the minor be bound by any endorsement of payment made by his natural mother.

Swaminatha Odayar v. *Natesa Iyer*, (1933) 65 M.L.J. 350, relied on.

Chennappa v. *Onkarappa*, (1939) 2 M.L.J. 884: I.L.R. (1940) Mad. 358 (F.B.), explained.

Petition under section 25 of Act IX of 1887, praying that the High Court will be pleased to revise the decree of the Court of the District Munsiff of Tiruturaipundi, dated 31st October, 1941 and passed in S. C. S. No. 261 of 1941.

A. V. Viswanatha Sastri for Petitioner.

G. Jagadisa Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—The defendant is the petitioner and he seeks to have the decree passed against him in S. C. S. No. 261 of 1941 on the file of the District Munsiff's Court of Tiruturaipundi revised. He is a minor and the suit was for recovery of money due on a promissory note executed by one Viswanatha Iyer, his natural father, as his guardian on the 7th September, 1936, in favour of the plaintiff. The suit was filed only in 1941 and an endorsement of payment signed by Minakshi Ammal, the natural mother of the defendant as his guardian, was alleged as saving the suit from being barred by limitation. It was pleaded that the natural father was not the lawful guardian of the defendant and that therefore the defendant cannot be made liable for a debt incurred on a promissory note executed by Viswanatha Iyer as his guardian and it was also pleaded that Minakshi Ammal was not the lawful guardian and that the endorsement of payment by her will not save the suit from the bar of limitation. The learned District Munsiff overruled both the objections and found that the promissory note was valid and binding on the defendant, that the suit was not barred by limitation and decreed the suit.

Therefore the only two points for consideration in this petition are (1) whether Viswanatha Iyer, the natural father of the defendant, was a lawful guardian and

---

1. (1923) 46 M.L.J. 104: I.L.R. 47 Mad. 288 (F.B.).
2. (1892) I.L.R. 20 Cal. 370.
3. (1914) 27 M.L.J. 150: L.R. 41 I.A. 251: I.L.R. 42 Cal. 72 (P.C.).

* C. R. P. No. 263 of 1942. 24th November, 1942.

the promissory note executed by him valid and binding on the defendant, and (2) whether Minakshi Ammal was a lawful guardian of the defendant and the endorsement of payment signed by her was valid and binding on the defendant so as to save the suit from being barred by limitation.

In *Chennappa* v. *Onkarappa*[1], it was held by a Full Bench of this Court that no member of a Hindu family other than the father or mother has been recognised as having the right of guardianship and that no other relative can become the lawful guardian without an order of the Court. It is urged however in this case that Viswanatha Iyer and Minakshi Ammal were the lawful guardians because they happened to be the parents of the defendant. But it is contended that the defendant had been given in adoption and therefore the adoptive father and the adoptive mother alone would be the lawful guardians and not the natural father and the natural mother. The decision in *Tirappayya* v. *Mallidi Ramaswami*[2] was relied on for the respondent. But that case proceeded as will be seen from the following observation in it, on a view not accepted by the Full Bench decision cited above.

"The cases cited show that a person who is lawfully acting as guardian, though not legally appointed for the purpose, can bind his estate for necessary purposes, and, I think, that such a person is a 'lawful guardian' within the meaning of section 21 of the Limitation Act, 1908, when acting for the benefit of the minor."

In *Sreenarain Mitter* v. *Sreemutty Kishen Soondery Dasee*[3], their Lordships of the Privy Council observed :

"If the child was adopted, his natural father was not his guardian."

In *Purushottam Ratho* v. *Brindavana Dass*[4], Ramesam, J., had occasion to review the case-law as regards the competing claims of the natural parents and the adoptive parents of a boy given in adoption and it was observed by him that,

"it does not follow from this that the natural parents can be regarded as guardians *de jure*."

At page 668 he observed :

"this shows that the natural parent should not be regarded as the natural guardian of an adopted person."

Later on he observed :

"It cannot be said that until appointment by Court the natural parents can be regarded as guardians *de jure*."

In *Swaminatha Odayar* v. *Natesa Iyer*[5], which is a direct case in point, it was held by a Bench of this Court that even where the adoptive parents of a minor are dead, the natural father cannot be said to be his lawful guardian so as to entitle him to bind the minor by any promissory note executed by him as his guardian. At page 353 Reilly, J., observes :

"Both his great-uncle and his great-uncle's wife had died ; but that would not make his natural father, defendant 1, again his legal guardian. Under the Hindu Law the natural guardians of a minor are only his parents, and defendant 1 was legally no longer defendant 2's father after defendant 2's adoption. Defendant 1 was no more than what is often called a *de facto* guardian, that is, a person who arrogates to himself the charge of a minor's person or property."

It was held that the promissory note was not binding on the minor. That is a case directly in point and it is a decision by a Bench of this Court.

It is urged for the respondent that the decision of the Full Bench in *Chennappa* v. *Onkarappa*[1] that the parents are the lawful guardians by reason of a universal usage or custom must be taken to indicate that it referred only to the natural parents and not to adoptive parents and it is also stated that it is not on any principles of Hindu Law that the decision in that case was based but on universal usage or custom. But it must be remembered that the ruling of the Full Bench has to be understood in the light of the observations of the Privy Council in *Sreenarain Mitter* v. *Sreemutty Kishen Soondery Dasee*[3] already referred to. It cannot be said that the finding in *Swaminatha Odayar* v. *Natesa Ayer*[5], which is based on the same view of

1. (1939) 2 M.L.J. 884 : I.L.R. (1940) Mad. 358 (F.B.).
2. (1913) 24 M.L.J. 428.
3. (1873) 11 Beng.L.R. 171 at 191 (P.C.).
4. (1931) 33 L.W. 664.
5. (1933) 65 M.L.J. 350.

the law as was the decision of the Full Bench in *Chennappa* v. *Onkarappa*[1] could be said to be incorrect.

Neither Viswanatha Iyer nor Minakshi Ammal was the lawful guardian of the defendant on the dates on which they purported to act in this case, one by executing the note and the other by signing the endorsement. Consequently the suit fails. The decree of the lower Court is set aside and the suit dismissed with costs in both the Courts.

K.S. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BELL.

P. M. Mohammad Usman Co., through its Managing Partner B. P. Usman .. *Petitioner* (Decree-holder-Respt.)*

v.

Kottekkaran Kunhamu .. *Respondent (Judgment-debtor).*

Civil Procedure Code (V of 1908), Order 38—Arrest before judgment—Debtor finding surety under Order 38, rule 2—Surety obtaining discharge after passing of decree under rule 3—Necessity to call upon defendant to find fresh surety—Proper procedure.

A plaintiff obtained an order under Order 38, Code of Civil Procedure, for the arrest of the defendant before judgment. The defendant found surety under Order 38, rule 2. This surety, after decree, applied for his discharge under Order 38, rule 3 and the conditions being fulfilled he was discharged. The Court thought that the decree having been passed, Order 38 was no longer applicable, but that something in the nature of proceedings under section 51 of the Code of Civil Procedure was. On revision,

Held, as the arrest of the debtor was made under Order 38, the proceedings must continue under that order. The Court must therefore call upon the defendant to find fresh security under rule 3 and if he fails to comply with that or any order under rule 2 or 3, the Court has a discretion to commit him to prison.

Petition under section 25 of Act IX of 1887, praying that the High Court will be pleased to revise the order of the Court of the Principal District Munsiff of Tellicherry, dated 17th July, 1941 and made in S. M. P. No. 67 of 1941 in S. C. S. No. 431 of 1940.

B. Pocker for Petitioner.

O. T. G. Nambiar for Respondent.

The Court delivered the following

JUDGMENT.—The petition must succeed to this extent. The petitioner is the decree-holder. He succeeded in obtaining an order under Order 38, Civil Procedure Code, for the arrest of the judgment-debtor before judgment. The defendant found surety under Order 38, rule 2. The surety, after decree, applied for his discharge under Order 38, rule 3. The conditions were complied with and the surety was discharged. Then, the Court should have called upon the defendant to find further security. This was not done. Consequently rule 4 does not apply. The Court appears to have thought that the decree having been passed, Order 38 was no longer applicable, but that something in the nature of proceedings under section 51 of the Code of Civil Procedure were.

In my opinion, this view is erroneous. The arrest was made under Order 38, and proceedings must continue under that order. The Court must therefore call upon the defendant to find fresh security under rule 3 and if he fails to comply with that or any other order under rule 2 or 3, the Court has a discretion in committing him to prison. How it exercises that discretion is not a matter for me, but the case must go back to the lower Court for this procedure to be followed.

The petition will be allowed with costs.

K.S. — *Petition allowed.*

---

1. (1939) 2 M.L.J. 884 : I.L.R. (1940) Mad. 358 (F.B.).

* C. R. P. No. 1911 of 1941. 21st October, 1942.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMAYYA.

Janaki Bai Ammal, Zamindarini of Melmandai .. *Appellant** (*Deft.-Appt.*)

v.

N. Chinniah Nadar (dead) and others .. *Respondents* (*Plffs. and Respts.*).

Madras Estates Land Act (I of 1908), sections 111 and 112—" Rent "—Meaning—Lease of trees apart from land—Suit for recovery of amount due by lessee—Applicability of section 111.

Where the palmyra trees in an estate were leased out on certain terms and the lessee having defaulted in the payment of the rent the landholder sought to bring the holdings to sale under section 111 of the Madras Estates Land Act and thereupon the ryot sued under section 112 for a declaration that they were not saleable,

Held, that as the trees were separately leased apart from the land the sum payable by the lessee to the proprietor was not ' rent ' as defined in the Act and that therefore resort to section 111 of the Act was not permissible.

Appeals against the decrees of the District Court of Tinnevelly in A.S. Nos. 29, 28, 34, 39, 50, 51, 65, 73, 77, 78, 81, 97, 99, 101, 109, 110, 111, 117 and 121 of 1934 preferred against the decrees of the Court of the Sub-Collector of Tuticorin in Summary Suit Nos. 8, 7, 13, 18, 32, 33, 47, 59, 64, 66, 69, 85, 87, 89, 97, 98, 99, 107 and 111 of 1932.

B. Sitarama Rao and *K. R. Rama Aiyar* for Appellant.

J. S. Vedamanickam for Respondents.

The Court delivered the following

JUDGMENT.—This is a batch of Second Appeals in which the same questions arise for determination. In all the suits the ryots of the estate of Melmandai Zamindari in Tinnevelly District were the plaintiffs and the defendant was the Zamindarini. In each suit the plaintiff-ryot objected to the sale of his holding. The proprietrix (landholder) was attempting to bring them to sale under section 111 of the Estates Land Act and the suits were filed under section 112 for a declaration that they are not saleable under section 111. The chief question is whether the amounts for which the holdings of the plaintiffs in the various suits were sought to be brought to sale come within the definition of the word ' rent ' as defined under the Estates Land Act. Under section 111 where an arrear is not paid within the revenue year in which it accrued due, it shall be lawful for the landholder to sell the holding or any part thereof in the manner thereinafter provided, in satisfaction of the arrear and of interest thereon and of costs, if any, of the sale. Under section 112

" Where the landholder to whom an arrear is due intends to avail himself of the powers given by the last preceding section, he shall serve on the defaulter through the Collector a written notice stating the amount due for arrears, interest and costs . . . . . . informing him that if he does not pay the amount or file a suit before the Collector contesting the right of sale within thirty days from the date of service of the notice, the said holding or any part thereof specified in the said notice will be sold."

The arrear spoken of in sections 111 and 112 is the arrear of rent. The word ' holding ' which is sought to be sold under sections 111 and 112 is the holding as defined by section 3, clause (3). It runs thus :

" 'Holding ' means a parcel or parcels of land held under a single patta or engagement in a single village :

Provided that if the landholder and ryot so agree in writing any portion of a holding as above defined shall be treated as a separate holding."

Sections 111 and 112 are therefore obviously applicable only to ryots in respect of the arrear of rent which is due in respect of their holding.

The word ' rent ' is defined in section 3 as meaning—

" Whatever is lawfully payable in money or in kind or in both to a landholder for the use or occupation of land in his estate for the purpose of agriculture . . . ."

The word ' ryot ' means

" a person who holds for the purpose of agriculture ryoti land in an estate on condition of paying to the landholder the rent which is legally due upon it."

---

* S. A. Nos. 483 to 500 of 1937 and 502 of 1937. 26th March, 1942.

There is a large number of palmyra trees in this estate and these trees are leased out on certain terms which it is not necessary here to set out in detail. Generally no rent is payable for some years and then certain sums are payable according to the classifications mentioned in the engagements with the exact details of which we are not now concerned. Whatever sum is payable under the agreements was sought to be recovered by the appellant (the landholder) by resort to summary procedure under section 111 of the Estates Land Act. The ryots brought these suits contesting the landholder's right of sale and their chief point is that the sums that are payable by them under the various engagements are not 'rent' within the meaning of the Estates Land Act and that therefore resort to summary procedure under section 111 of the Act is not open to the landholder. If it is 'rent' as defined in the Estates Land Act, then the landholder can undoubtedly proceed under section 111. Therefore we have to turn to the definition of the word 'rent.' Its definition has been set out already. Then there is another clause in clause (11) (of section 3) which runs thus :—

"For the purpose of sections . . . . 59 to 72, 77 to 131 . . . . 145 to 148, 165, 210 and 211 and the Schedule rent includes also

(*a*) any local tax, cess, fee or sum lawfully payable by a ryot as such in addition to the rent due in respect of land according to law or usage having the force of law and also money recoverable under any enactment for the time being in force as if it was rent ; and

(*b*) sums lawfully payable to a landholder by a ryot as such on account of pasturage fees and fishery rents."

Does the sum payable under these agreements in respect of these trees satisfy the definition of rent contained in section 3, clause (11) or at any rate does it come under the additional clause (*a*). As regards the body of the section it can, I think, be hardly contended that the sum in question is payable by a ryot for the use or occupation of ryoti land for the purpose of agriculture. If the trees alone are granted separately from the land or if the sums payable in respect of the trees are separately fixed from what is payable for the land on which they stand there is no sum payable for the use of ryoti land in an estate. As said already, the word "ryot" means :—

"a person who holds for the purpose of agriculture ryoti land in an estate."

and rent means "what is payable by a ryot." Therefore if it is not payable in respect of ryoti land in an estate the sum cannot be termed rent as defined under section 3 (11). In this case if the trees are separately taxed and there is a separate engagement in respect of the trees, it is clear that in respect of those engagements it is not in respect of any ryoti land in an estate that the sum is made payable but it is a payment which has no reference to any ryoti land in an estate and it is not payable by a ryot. Then as regards clause (*a*) it may be it is not a local tax, cess or fee. But it is contended that it is a sum lawfully payable to a landholder by a ryot as such in addition to the rent due according to law or usage having the force of law. Here again the difficulty is that it must be payable 'by a ryot as such.' As analysed by the Courts below the trees which are the subject of the various engagements may be divided into three classes : those that do not stand on ryoti land in the estate, *i.e.*, those that stand on porombokes or forest lands; (2) those that stand on the ryoti holdings of persons other than the persons to whom the trees are assigned ; *e.g.*, the trees which stand on the holdings of *A*, *B* and *C* who are all ryots in the estate may be leased not to those persons but to a third person altogether who may or may not be a ryot holding a ryoti land in an estate. If he is not a ryot holding a ryoti land in an estate, then it can hardly be said that he is paying the sum fixed under the agreement as a ryot or in his capacity as a ryot. Even if he is a person who holds agricultural land in the estate and is therefore a ryot, in respect of the trees that stand on the holdings of *A*, *B* and *C* it can hardly be said that it is payable by a ryot as such; (3) then as regards the trees in the holdings of the very person to whom the land is assigned on ryoti tenure, *i.e.*, if the trees stand on the holdings of the very person to whom the trees are assigned, even then the question would be whether as regards the trees he makes any payment as a ryot. Can it be said of the sum payable that 'it is payable by a ryot as such in addition

to the rent due according to law or usage.' This question was considered by Krishnaswami Ayyangar, J., in C.R.P. No. 2121 of 1939 which arose in the same zamindari between the proprietrix and the ryots under section 15 of Madras Act IV of 1938, in respect of the sums payable for palmyra trees. Under section 15 of that Act, if a ryot paid up all arrears of rent accrued due in respect of any holding for faslis 1346 and 1347, the arrears of rent for fasli 1345 and prior faslis which may be outstanding on the date of the Act shall be deemed to have been discharged. The word 'rent' is defined by the Madras Act IV of 1938 as

"rent as defined by the Madras Estates Land Act or rent or michavaram as defined by the Malabar Tenancy Act, 1929, or quit rent, jodi, kattubadi, poruppu or the like. . . ."

We are not concerned with the other expressions. We are only concerned with this definition. "Rent means rent as defined by the Madras Estates Land Act, 1908." In the cases which came up before my learned brother, the persons to whom the trees were assigned on engagements similar to the ones with which I am now concerned paid up the arrears of faslis 1346 and 1347 and claimed that in respect of the arrears of fasli 1345 and prior faslis, there was a complete discharge. If the sum payable by the lessee to use a colourless expression—was rent under the Estates Land Act, there would be a discharge of all arrears up to fasli 1345. The learned Judge had therefore to consider the question whether the sums payable by the lessees, under similar engagements satisfied the definition of the term 'rent.' The learned Judge went into the question exhaustively, considered all the aspects of the question and pointed that a lessee such as the present can hardly be described as holding any ryoti land in an estate in respect of the trees and that it is so even in a case where the trees stand in his holding for which there is a rent separately fixed. I have very little to add to the reasoning of the learned Judge and I respectfully follow that decision. As both the lower courts have pointed out on a prior occasion when the zamindarini filed a suit for the establishment of her rights to the trees, the question arose as to what exactly was the tenure in cases of such leases. The trial Court and the appellate Court held that the trees were being leased out distinct from the land, that they were taken out of the purview of section 12 of the Estates Land Act and that the ryots were not entitled to the ownership of the trees. I therefore hold that the sum payable by the lessee to the proprietor is not 'rent' as defined under the Estates Land Act and that therefore resort to section 111 is not permissible.

The second appeals are dismissed. The respondents will have all the other expenses and a sum of Rs. 150 as Advocate's fee for all the second appeals together.

There is nothing in the memorandum of objections and it is dismissed; no costs.

Leave to appeal refused.

B.V.V. ——— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Meesala Vijayaratnam Naidu and another .. *Appellants** (*Defendants 3 and 4*)

v.

Rao Bahadur Sripathi Sitapatirao Pantulu Garu and others .. *Respondents* (*Plff. and Defts. 1, 2 & 5*).

Madras Agriculturists' Relief Act (IV of 1938), section 3 (11), Proviso D—Madras Estates Land Act (I of 1908), section 3 (2)—Definition 'estate'—Mortgagors of part of village held in inam—Whether exempt from the benefits of Act IV of 1938.

Where defendants 2 to 4 in the suit, being mortgagors, were found disentitled to relief under Act IV of 1938 by reason of proviso D to section 3 (2) of the Act on the ground that they were landholders of estates or portions thereof, in respect of which estates, taken together, a sum exceeding Rs. 100 was payable as quit rent, etc.,

Held, that inasmuch as the holding of the mortgagors was an *inam* forming a portion of a village only and was situated within a Government village (though it had been originally granted by the

* Appeal No. 46 of 1940 and C.M.P. No. 6035 of 1940. 6th July, 1942.

holder of a permanently settled estate which had been subsequently forfeited to Government, the inamdar having however continued in possession and the inam having been enfranchised to him in 1863) the holding will not be an estate.

Held, further, that the practice whereby one of the defendants who was clearly possessed of assets abstained from joining in an appeal in order that the other defendants might prosecute the appeal as paupers was reprehensible. But considering the present case, the refusal of the relief under the Act to the second defendant would be a penalty out of all proportion to the gravity of his offence in not joining in the appeal, and therefore the proper punishment for him would be to make him bear his own costs in spite of the appeal being allowed in his favour.

Appeal against the decree of the Court of the Subordinate Judge of Chicacole, dated 31st December, 1938, in O. S. No. 20 of 1938.

P. V. Vallabhacharyulu for Appellants.

P. Somasundaram, S. Ramamurthy, S. Subramania Sastri and *Kasturi Seshagiri Rao* for Respondents.

The Judgment of the Court was delivered by

Wadsworth, J.—This appeal is preferred against the decree in a mortgage suit. The appellants are the 3rd and 4th defendants. There is a petition on behalf of their father, the second defendant, praying that under Order 41, rule 33, Civil Procedure Code, he may be granted the relief to which he is entitled on the grounds urged by the appellants. The mortgage Ex. J was executed on 19th June, 1930, by the first defendant and his mother and by defendants 2, 3 and 4. It bound properties of the first defendant and also properties standing in the names of defendants 2 to 4. The principal sum secured was Rs. 16,100 and the rate of interest was 13½ per cent. compound. In the trial Court it was found that none of the defendants were agriculturists and this finding is not challenged so far as the first defendant is concerned. The lower Court held that defendants 2 to 4 were disentitled to relief under Act IV of 1938 by reason of proviso (D) to section 3 (*ii*) of the Act, on the ground that they were landholders of estates or portions thereof in respect of which estates taken together a sum exceeding Rs. 100 was payable as quit rent, etc. The decision of the lower Court must be held to be wrong, unless it can be shown that a service inam holding in a village called Chintada is an estate or part of an estate in respect of which defendants 2 to 4 are landholders. They have been found to be members of a joint family and it is established that a quit rent of Rs. 82-10-5 is paid on this inam.

The history of the land is peculiar. It is situated in what was once the Palakonda zamindari which was settled permanently in 1803. In 1809 the proprietor of this zamindari made a grant of these lands, which form only a portion of the village, to the then holder of the karnam service. In 1833, as a result of rebellious acts the zamindari was forfeited and the estate was declared to be land belonging to the Government. But the holders of the service inam lands in Chintada continued in possession and their holding was enfranchised in the Inam Commission proceedings of 1863 on payment of the quit rent already mentioned. Since that date these lands have been held as an inam holding situated within a Government village.

The lower Court has held that nevertheless the holders of this inam are landholders of an estate or portion of an estate under the Madras Estates Land Act for the purpose of proviso (D) to section 3 (2) of Act IV. We are unable to support this decision. It seems to us clear that clause (*d*) of the definition of 'estate' in section 3 (2) of the Madras Estates Land Act can have no application to this land for there was never any grant of a village. The grant was only of a portion of the land within a village. Nor can clause (*b*) of this definition apply; for there is no separately registered portion of any estate. It is suggested that on the analogy of the decision of the Privy Council in *Narayanaraju* v. *Suryanarayudu*[1], this must be regarded as a case of a minor inam granted subsequent to the permanent settlement, situated within a zamindari, the grantee of which may be deemed for purposes of the Estates Land Act to be the landholder of a portion of an estate. It seems to us that this decision can have no application when there is no estate and the inam in

1. (1939) 2 M.L.J. 901 : L.R. 66 I.A. 278 : I.L.R. (1940) Mad. 1 (P.C.).

question is part of a Government village. The fact that historically the inam was a century ago part of an estate seems to us to have no bearing on its present status. Clearly the Chintada lands are not either an estate or part of an estate in respect of which the owners can be regarded as landholders. It follows that defendants 2, 3 and 4 have been wrongly denied the benefits of Act IV of 1938.

The second defendant is not an appellant and it is suggested to us that he abstained from joining in the appeal in the hope that his sons, defendants 3 and 4, might be allowed to prosecute the appeal *in forma pauperis*. They have in fact been required to pay full court-fee. We do not approve of a practice whereby one of the defendants who is clearly possessed of assets abstains from joining in an appeal in order that other defendants may prosecute the appeal as paupers. But we consider that the refusal of the relief under Act IV of 1938 to the second defendant would be a penalty out of all proportion to the gravity of his offence. The amount claimed in the suit is Rs. 44,000 odd whereas the mortgage is liable to be scaled down to a little over a quarter of that amount. It seems to us that the proper way of expressing our disapproval of the conduct of the second defendant is by requiring him to pay his own costs. In the result therefore the appeal is allowed and the lower Court's decree will be modified, leaving intact the liability of the first defendant and his lands for the full amount decreed by the trial Court, the decree as against defendants 2, 3 and 4 being scaled down so that they and their lands shall be liable in the sum of Rs. 12,500 plus Rs. 133-6-0 being the expenses incurred on the preservation of the property, with interest at 6¼ per cent. from 1st October, 1937, up to the date fixed for payment which will be three months from to-day with subsequent interest at 6 per cent. The plaintiff will be entitled to only proportionate costs so far as these defendants are concerned and will pay costs in the trial Court to defendants 3 and 4 proportionately to the extent to which his claim has been disallowed and in appeal the plaintiff-respondent will pay costs to the appellants, defendants 3 and 4, and the second defendant will bear his own costs. It is represented that certain properties of defendants 2 to 4 have been sold in execution of the lower Court's decree for a sum which is considerably less than the amount to which the decree is now scaled down. The sale was not stayed because of the failure of the appellants to deposit the amount ordered as a condition precedent to the grant of a stay by this Court. In the circumstances it seems to us proper to hold that this sale will stand, unless the parties interested deposit the sale price plus poundage, etc., within the time fixed for redemption.

K.C. —————— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Ordinary Original Civil Jurisdiction.)

PRESENT :—MR. JUSTICE CHANDRASEKHARA AYYAR.

The Egmore Benefit Society, 3rd Branch, Limited, by its Secretary and Treasurer, T. G. Damodara Mudaliar .. *Plaintiff**

v.

K. Aburupammal and others .. *Defendants.*

Transfer of Property Act (IV of 1882), section 69—Private sale—Purchase of property by mortgagee—Permissibility—Covenant in deed enabling purchase—Effect—Provision for enhanced interest on arrears of interest—Penalty.

The law with reference to section 69 of the Transfer of Property Act is that the mortgagee cannot purchase the property at the private sale, the principle being that a man cannot contract with himself. And this principle is not abrogated merely because there is a contract between the mortgagor and the mortgagee that the latter could purchase the mortgaged property at the auction. To allow such a contract will be to negative the provision based on public policy that the equity of redemption should not be destroyed except by a decree of court or in any manner known to law. *Purmananddas Jiwandas* v. *Jumnabai*, (1885) I.L.R. 10 Bom. 49 and *Farrar* v. *Farrars, Ltd.*, (1888) 40 Ch.D. 395, referred to.

Where a mortgage deed in favour of a Fund provided for interest at 12 per cent. per annum on the arrears of interest and on the monthly subscriptions which the mortgagors defaulted in paying,

Held, that the covenant to pay the enhanced interest was an independent and secondary contract though connected with the primary one and was not penal in its nature so as to be relieved against.

* C. S. No. 157 of 1941. 17th July, 1942.

N. K. Mohanarangam Pillai and *M. V. Gopalaratnam* for Plaintiff.

R. Thirumalaiswami and *W. S. Krishnaswami Naidu* for Defendants.

The Court delivered the following

JUDGMENT.—This is a suit by the Egmore Benefit Society for the recovery of possession and mesne profits of the property described in the schedule to the plaint on foot of a purchase made by the Society in a sale held by them under section 69 of the Transfer of Property Act ; in the alternative, if the sale is held to be illegal or void for any reason, the suit is for recovery of the amount due under the mortgage executed by defendants 1 and 2 (husband and wife) by sale of the mortgaged property.

The mortgage deed is dated 7th January, 1937, and is for a sum of Rs. 4,350 with interest at $6\frac{1}{4}$ per cent. per annum and there is provision that in default of payment of arrears of subscription and interest, the arrears were to carry interest at 2 pies per rupee per month, which works out at $12\frac{1}{2}$ per cent. per annum. The deed provides for the exercise by the mortgagors of the power of sale provided in the Transfer of Property Act and there is a clause authorising the Society to purchase the property as the highest bidder at any such sale. Default having been committed in the payment of the subscription and interest, the property was brought to sale by the Society on 15th April, 1940 and was purchased by the Society itself for a sum of Rs. 4,000 leaving a balance of Rs. 279-2-0 still due under the mortgage on that date. On the basis of this sale the Society now seeks to recover possession of the property from the defendants together with mesne profits at Rs. 50 per mensem. If the sale is held to be void or inoperative, the plaintiffs want a mortgage decree for sale for the amount due to them.

It has been already stated that defendants 1 and 2 are the mortgagors. The property stands in the name of the 1st defendant, the wife, having been purchased by her under a sale deed dated 15th September, 1936, from the Nedungadi Bank. The deed was executed not only by her but by her husband who acted in the transaction also on behalf of his minor sons Mohanasundara and Nagaraja, who are impleaded as defendants 3 and 4 in the suit. Mohanasundara was a minor on the date of the mortgage deed but is now a major. Nagaraja continues to be a minor, and his guardian *ad litem* is his elder brother, the 3rd defendant.

The 2nd defendant has filed no written statement and does not appear. The 1st defendant impugns the validity of the sale held under section 69 of the Transfer of Property Act and contends that it is a void one because the purchase was by the mortgagees themselves. There is a plea that the plaintiffs agreed after the sale to take a fresh mortgage for Rs. 4,000 and they must be compelled to stand by this agreement. But no issue was taken on this plea and it was not pressed because it is on the face of it unsustainable. It is said that the provision for payment of interest at $12\frac{1}{2}$ per cent. is in the nature of a penalty and should be relieved against; and that mesne profits at Rs. 50 per mensem is excessive. Defendants 3 and 4 raised an additional contention, namely, that the property belongs to them in their own right under the will of their grandfather Arumugha Nadar, which was probated in O. P. No. 106 of 1913.

The sale in favour of the plaintiffs must be held to be invalid. A mortgagee exercising a power of sale under section 69 of the Transfer of Property Act cannot purchase the property himself. This is such a well-established proposition that it cannot be disputed. But what is argued on behalf of the plaintiffs is that there is a contract in the mortgage deed authorising the mortgagee to make the purchase, if he happens to be the highest bidder at the sale. The law as understood with reference to section 69 of the Transfer of Property Act is that the mortgagee cannot purchase the property and the Act does not save contracts between the parties to the contrary. To allow such a contract would be to negative altogether the provision based on public policy that the equity of redemption should not be destroyed except by a decree of Court or in any manner known to law, *Purmananddas Jiwandas*

v. *Jamnabai*[1] and *Farrar* v. *Farrars, Ltd.*[2] were among the cases relied on by the plaintiffs in this connection. The facts of the two cases are entirely different from those in the present case. In the Bombay decision it was recognised that the title acquired by the plaintiff by purchase at the auction in the name of Purushotham Muljee for his own benefit on the plaintiff's behalf was liable to be impeached by the representatives of the mortgagor. As a matter of fact, there was a suit for redemption of the mortgage brought by the mortgagor's representatives notwithstanding the same. In the course of the suit however the son of the mortgagor gave an undertaking that he would not dispute the sale of the premises in question. *Farrar* v. *Farrars, Ltd.*[2] was a case where the property was purchased in the name of a shareholder in a corporation which was the mortgagee and the question arose whether the purchase should be deemed to be by the corporation; and it was held that, as there was no fraud of purchase by the shareholder, it need not be deemed to be a purchase by the corporation necessarily and that the sale should stand for this reason, namely, that it was not a purchase by the mortgagee but by a third party. The principle enunciated in all the cases is that a man cannot contract with himself and in such a case there cannot be any independent bargaining as between two opposite parties. This principle is not abrogated merely because there was a contract between the mortgagor and the mortgagee that the mortgagee could purchase. The purchase would nevertheless be a sale by one person to himself without any independent bargain. The equity of redemption cannot be extinguished by a mere contract for sale to the mortgagee. The mortgagee has to reach it by methods known to law.

At first, I thought that the provision for payment of enhanced interest at 12 per cent. per annum was penal and must be relieved against. But it is now pointed out to me, and this alters the situation materially in favour of the plaintiffs, that the higher rate of interest is not on the principal sum secured by the mortgage but is only on the arrears of interest and the monthly subscriptions which the mortgagors default in paying. This is an independent and secondary contract though connected with the primary one and there is no rule of law which says that such a stipulation must be regarded as a penal one.

The only other question that remains is the point taken by defendants 3 and 4 that they are entitled to the property under the will of their grandfather. This would have been relevant and material if the suit had to proceed on the basis of title. But as the sale has been held to be invalid, the suit has now become one on foot of the mortgage deed executed by defendants 1 and 2. According to the transaction the property belongs to the mother and the father appears to have joined in the execution of the mortgage deed merely as a surety. In doing so he acted also on behalf of his sons defendants 3 and 4. The plaintiffs cannot have anything higher than a personal decree against defendants 1 and 2 for the amount due and a decree for sale of the right, title and interest of the mortgagors in the mortgaged property. It is said on behalf of the plaintiffs that defendants 3 and 4 are squatting on the property not in assertion of any title in them as legatees or devisees under their grandfather's will marked Ex. D-1, but as the sons of the owner Aburupammal. This may be and probably is true having regard to the documents filed on the plaintiffs' side and marked as Ex. P-2. But it is unnecessary to investigate in this suit the independent title set up by defendants 3 and 4 under the will. They are welcome to agitate it in any appropriate proceedings that they may take for the purpose.

In the result, the plaintiffs will have the usual mortgage decree for sale against defendants 1 and 2 for Rs. . . . . which is the amount due up to the date of plaint together with costs and interest at 6¼ per cent. per annum from the date of the plaint till the date fixed for redemption and six per cent. thereafter. Time for redemption four months.

---

1. (1885) I.L.R. 10 Bom. 49. 2. (1888) 40 Ch. D. 395.

The personal decree against the 2nd defendant will enable the plaintiffs to proceed against defendants 3 and 4 to the extent of the properties of their father in their hands. There will be no order as to costs in favour of defendants 3 and 4.

B.V.V. ——— *Suit decreed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MOCKETT AND MR. JUSTICE HAPPELL.

V. E. A. Annamalai Chettiar .. *Appellant** (*Petr.*)

v.

Valliammai Achi and another .. *Respondents* (*Respts.*).

Limitation Act (IX of 1908), Article 182 (5)—Step-in-aid of execution—Application for attachment—Final order recording petition—Fresh application for receiver—Dismissal—Claim subsequently upheld—Appeal—Whether can be treated as "step-in-aid".

The appellant obtained a decree on 3rd November, 1934, against defendants 1 and 2. On 19th December, 1934 he applied in execution and the Court first passed an interim order of attachment and then passed an order on 21st January, 1935, to the effect "Rule absolute : petition is recorded." On 11th February, 1935, the appellant filed an execution application in the previous execution petition and prayed therein for the appointment of a receiver to realise the decree amount, and an order was passed therein on 10th July, 1935, in the following terms : "may apply after second defendant's claim is disposed of. Dismissed." On 25th July, 1935, the second defendant applied for raising the attachment and an order was passed in his favour on 22nd October, 1935. The appellant preferred an appeal against the said order on 7th December, 1936 and the same was dismissed by the High Court on 27th September, 1938. The appellant filed an application for attachment of the movable properties of the judgment-debtor on 25th November, 1939.

Held, that the last execution application was barred by limitation and that the previous execution petition filed on 19th December, 1934, had been finally disposed of on 21st January, 1935 and was no longer pending.

Held, further, that the appeal preferred to the High Court was not an application to take some step-in-aid of execution within the meaning of Article 182 (5) of the Limitation Act as the Court had not been asked to do anything to aid execution and did not save limitation.

Appeal against the order of the Court of the Subordinate Judge of Devakottai, dated the 10th July, 1940 and made in E. P. No. 72 of 1940 in O. S. No. 118 of 1934.

R. Rangaswami Aiyangar for Appellant.

T. M. Krishnaswami Aiyar and *A. Balasubramania Aiyar* for Respondents.

The Judgment of the Court was delivered by

Mockett, J.—This is an appeal against an order in execution made by the learned Subordinate Judge of Devakottai. The decree-holder is the appellant. The relevant dates and facts are as follows :—

On the 3rd of November, 1934, the appellant obtained a decree against defendants 1 and 2 as the legal representatives of the estate of the defendants in the suit.

On the 19th of December, 1934, the appellant filed E. P. No. 418 of 1934 in which he asked for the following relief :

"By directing the garnishees to pay the amount into Court and in default of such payments to sell the said debts or to appoint a receiver to collect the same and credit the same to the plaintiff in respect of the decree amount with interests and costs."

An interim order for attachment was made and on the 21st of January, 1935, the Court made the following order on the petition :

"Rule absolute. Petition is recorded."

The property, the subject of this execution petition was "an amount in deposit in L. S. T. S. P. Shop at Tinnevelly belonging to the second garnishee standing in the name of the first defendant."

On the 11th of February, 1935, the appellant filed E. A. No. 123 of 1935 in E. P. No. 418 of 1934 and he there prayed for the appointment of a receiver to realise the decree amount, interest and costs out of the amount in the hands of the garnishees. The order on E. A. No. 123 of 1935 dated the 10th July, 1935, was, "may apply after the second defendant's claim is disposed of. Dismissed." On the 25th of

* A. A. O. No. 154 of 1941. 19th August, 1942.

July, 1935, the second defendant filed E. A. No. 527 of 1935 praying the Court to raise the attachment above mentioned on the ground that the monies concerned were not those of the judgment-debtor, but belonged to the second defendant personally. On the 22nd of October, 1936, the learned Subordinate Judge of Devakottai allowed the second defendant's application and raised the attachment. On the 7th of December, 1936, the present appellant filed A. A. O. No. 21 of 1937 against the order of the Subordinate Judge. On the 27th of September, 1938, King and Krishnaswami Ayyangar, JJ., dismissed the appeal. On the 25th of November, 1939, the execution petition E. P. No. 72 of 1940, the subject of the appeal before us now, was filed by the decree-holder. It sought to attach some movable properties of the judgment-debtor. The Additional Subordinate Judge has dismissed that application on the ground that it was barred by limitation. Against that order the appellant appeals. He contends that E. P. No. 418 of 1934 has never been disposed of, nor has E. A. No. 527 of 1935. He further contends that A.A.O. No. 21 of 1937 filed on the 7th of December, 1936, was an application to the proper Court to take some step-in-aid of execution within the meaning of Article 182 of the Limitation Act, sub-clause (5) and that by reason of these circumstances his Execution Petition No. 72 of 1940 was in time. The wording of the order of the 21st of January, 1935, is not clear, because the words "Rule absolute" have little meaning in an execution petition. There is no doubt however that the learned Judge intended to say and meant, "Attachment absolute. The petition is recorded." The appellant argues that this order dealt only with the attachment, that the word "recorded" implies that the alternative remedies sought were left undisposed of. There is of course much to be said for that contention and we will assume that on the 11th of February, 1935, when E. A. No. 123 of 1935 was filed, E. P. No. 418 of 1934 was still to be treated as alive, and that E. A. No. 123 of 1935 was a continuation of that execution petition. But it seems to us that that will not assist the appellant. It is unnecessary to consider the numerous authorities of this Court which have from time to time commented on the unsatisfactory nature of such orders in execution matters. There is no doubt now that the meaning of each order has to be considered by itself and a decision come to as to what was the intention and effect of the order. We have little doubt that the order of the 10th July, 1935, finally disposed of E. A. No. 123 of 1935. It must be remembered that an order for the appointment of a receiver is an order made having regard to the relevant facts at the time of the application. The fact that the Court refuses to appoint a receiver on a certain date does not necessarily mean that owing to changed circumstances the Court will not later make the appointment. It seems to us that the Court in using the word "dismissed" intended to, and did finally, dispose of E. A. No. 123 of 1935. But the effect of the remark that the appellant might apply after the second defendant's claim is disposed of meant nothing more than that, if after that event, he was advised again to apply for receiver, there was nothing to prevent him doing so. If this is so, we have no doubt that, whatever life there was left in E. P. No. 418 of 1934, was taken away by the order of the 10th July, 1935. Everything had then been disposed of. The attachment had then been made absolute, and the application for the appointment of a receiver had been dismissed. Nor does it seem that the appellant thought otherwise. He never filed another application for a receiver. E. P. No. 72 of 1940, as already stated, concerned the attachment of movable properties and not the property originally sought to be attached. The appellant however put forward in a somewhat ambitious argument that E. A. No. 123 of 1935 should be treated as wholly separate from E. P. No. 418 of 1934 and that E. P. No. 418 of 1934 had never been disposed of and, we presume, never will be disposed of. We think this is an impossible proposition. If E. P. No. 418 of 1934 was not disposed of on the 21st January, 1935, the only possible position is that E. A. No. 123 of 1935 might be treated as a continuation of E. P. No. 418 of 1934. We are therefore unhesitatingly of the view that on the 10th July, 1935, there was no execution petition or application outstanding.

This brings us to the alternative contention of the appellant. He argues that A. A. O. No. 21 of 1937 was an application to the proper Court to take a step-in-

aid of execution of the decree. We are of opinion that this contention is entirely contrary to the authorities. It is unnecessary to refer to many of them. In *Kuppuswami Chettiar* v. *Rajagopala Aiyar*[1], it was held by Ayling and Venkatasubba Rao, JJ., that a statement filed by a decree-holder objecting to the judgment-debtor's application to enter up satisfaction of the decree is not a step-in-aid of execution, especially when no application for execution was then pending. Ayling, J., negatives the argument that any application, which would facilitate execution or prevent an obstacle being raised to execution, should be treated as coming within the words of the Article. He stresses that what is required is an application to take some step to advance an execution proceeding. The learned Judges express dissent from a decision of the Bombay High Court in *Laxmiram Lallubhai* v. *Balashanker Veniram*[2], in which it was held that an appeal against an order adjudging the judgment-debtor an insolvent was a step-in-aid of execution, a view which they consider was an undue extension of Article 182. In *Krishna Pattar* v. *Seetharama Pattar*[3], Phillips and Madhavan Nair, JJ., held that the filing of a statement by a decree-holder objecting to the judgment-debtor's application to record satisfaction of the decree is not a step-in-aid of execution of the decree ; and they cite with approval the observations of Ayling, J., in the above case. The learned Judges agreed with the trial Judge in holding that a decree-holder did not, in filing his objection statement, ask the Court to take any step-in-aid of execution, and they refer with apparent approval to the fact that Ayling and Venkatasubba Rao, JJ., had dissented from the view of the Bombay High Court in *Laxmiram Lallubhai* v. *Balashankar Veniram*[2]. In *Ramasami* v. *Veeranna*[4], Madhavan Nair and Curgenven, JJ., held that an application by a decree-holder for extension of time to file an encumbrance certificate was not a step-in-aid of execution. They stress, and it is of importance in the present appeal, that the application should be " one asking the Court to take some step in furtherance of the execution of the decree." In *Veerappa Setti* v. *Munisami Achari*[5], Beasley, C.J., and King, J., held that a batta application under Order 16, rule 1 asking the Court to summon witnesses for the purpose of showing that the judgment-debtors' objection that the decree had been satisfied was untrue was an application to take a step-in-aid of execution when the decree-holder had applied for the transfer of the decree to another Court for execution, which application was contested by the judgment-debtors. This decision, it will be seen, was based on the facts showing that, in an execution application before the Court, another application was filed asking the Court to do something, namely to summon witnesses. The learned Judges discuss *Krishna Pattar* v. *Seetharama Pattar*[3] and point out that in that case all that had been done was that a statement had been filed by the decree-holder objecting to the judgment-debtor's application to record satisfaction, but no application had been made to the Court by the decree-holder, for example, to summon witnesses, and they cite with evident approval the observations of Phillips and Madhavan Nair, JJ.,

> " Two things are essential. There must be an application and that application must ask the Court to take a step-in-aid of execution. . . . The bare fact that a party took some steps would not be enough."

In our view, the decision in *Veerappa Setti* v. *Munisami Achari*[5], is entirely in accord with the trend of authorities of this High Court. In *Govindas Rajaramdas* v. *Ganapatdoss Narottamdas*[6], Macleod, C.J. and Crump, J., have held explicitly that an appeal from an order passed in execution of a decree is not tantamount to a step-in-aid of execution within the meaning of Article 182. The learned Judges remark in a short judgment,

> " It certainly cannot be said that an appeal to the High Court against an order in a darkhast is an application in accordance with law to the proper Court for execution. The High Court is not a Court whose duty it is to execute decrees passed by the lower Court."

---

1. (1921) 42 M.L.J. 303 : I.L.R. 45 Mad. 466.
2. (1914) I.L.R. 39 Bom. 20.
3. (1926) 51 M.L.J. 480 : I.L.R. 50 Mad. 49.
4. (1927) 53 M.L.J. 766.
5. (1934) 69 M.L.J. 19 : I.L.R. 58 Mad. 301.
6. (1923) I.L.R. 47 Bom. 783.

In view of the above authorities we are of opinion that neither the affidavit filed by the respondent in E. A. No. 527 of 1935 on the 31st July, 1935, nor the appeal filed by him on the 7th December, 1936, can, in any possible view, be held to be applications in accordance with law to the proper Court to take some step-in-aid of execution of the decree. There has been no application to a proper Court and no Court has been asked to do anything to aid execution.

We will notice two further arguments put forward by the appellants. He argued that there had been an appeal (that is, his own appeal) which should be the starting point of limitation under Article 182 (2) and he relied on the decision of King and Krishnaswami Ayyangar, JJ., *Sriramachandra Rao* v. *Venkateswara Rao*[1]. We do not consider this decision assists the appellant. In that case the plaintiff obtained an *ex parte* decree against the defendant. There was an application to the Court to set aside the *ex parte* decree. It was dismissed and against the order of dismissal there was an appeal to the High Court. The learned Judges held that an appeal against an order refusing to set aside an *ex parte* decree was an appeal within the meaning of Article 182 (2) and they considered that the appeal should be an appeal which was likely to affect the decree sought to be executed. We do not consider that we can extend the meaning further so as to include all appeals in execution matters as well as appeals against the decree in the suit and the trend of authorities to which we have already referred to is against this contention. It is not suggested that the time occupied in resisting an application by a third party or the judgment-debtor likely to prejudice not the decree but its execution could furnish a new starting point, but we are asked to say that an appeal from an order made on such an application would do so. In support of his argument that under Article 182 (2) of the Limitation Act there has been an appeal and that the starting point in this case should be the date of the dismissal, namely, the 27th of September, 1938, the appellant has strongly relied on certain observations of the Judicial Committee. He cites the case of *Nagendranath De* v. *Sureshchandra De*[2]. At page 6, their Lordships observe :

"There is, in their Lordships' opinion, no warrant for reading into the words quoted any qualification either as to the character of the appeal or as to the parties to it ; the words mean just what they say. The fixation of periods of limitation must always be to some extent arbitrary, and may frequently result in hardship. But in construing such provisions, equitable considerations are out of place, and the strict grammatical meaning of the words is, their Lordships think, the only safe guide. It is at least an intelligible rule that, so long as there is any question *sub judice* between any of the parties, those affected shall not be compelled to pursue the so often thorny path of execution, which, if the final result is against them, may lead to no advantage."

We have however no doubt that the Judicial Committee referred to an appeal which affected the execution of the decree or order in the form sought in the subsequent execution petition. On the facts before us the appeal, A.A. O. No. 21 of 1937, had no relation whatever to E.P.No. 72 of 1940. At no time was this execution petition in any way delayed or liable to be affected by the appeal which was concerned with a wholly different matter. As their Lordships point out, it is unjust that a party should be compelled to pursue "the thorny path of execution," when the result of the pending appeal might cause it to be infructuous. But in A. A. O. No. 21 of 1937 the only question for decision was whether execution could be levied against property *A*. In this execution petition execution is sought to be levied against property *B* and the two proceedings have nothing whatever in common. For these reasons we do not think there is anything in Article 182 (2) which assists the appellant.

Finally we will refer to a decision of the Judicial Committee, *Maharaj Bahadur Sing* v. *A. H. Forbes*[3], which assists us if it is relevant to consider whether E. P. No. 72 of 1940 could be held to be a continuation of any previous application in execution. When considering whether an execution petition could be regarded as a continuation of an earlier petition, their Lordships observe at page 189,

"Their Lordships have no doubt that the applications of 22nd January, 1915, 19th March, 1917 and 23rd November, 1918, were essentially different in character from the application of 9th May,

1. (1938) 2 M.L.J. 1048 : I.L.R. (1939) Mad. 252.
2. (1932) 63 M.L.J. 329 : L.R. 59 I.A. 283 : I.L.R. 60 Cal. 1 (P.C.).
3. (1929) 57 M.L.J. 184 (P.C.).

1908 and they are inclined to the view that the decree-holders had abandoned the application of 9th May, 1908, which proceeded on the footing that their decree created a charge on the tenure, but in any event they are clearly of opinion that the combined effect of these previous applications marks such substantial departure from the original application of 9th May, 1908, as to make it impossible to hold that the application of 2nd December, 1922, was a continuation of the application of 9th May, 1908."

So, in the appeal before us, the petition on the facts was, as in the case before their Lordships, essentially different in character from any previous application and we take the view in this case that the decree-holder had abandoned his previous application and in any event, the application E. P. No. 72 of 1940 marks such a substantial departure from the previous application that it is impossible to hold that it was a continuation of it.

For the reasons which we have given this appeal must be dismissed with costs.

B.V.V. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BYERS.

M. L. Abdul Salam Sahib and others .. *Petitioners* (Accused).*

Defence of India Act (1939), section 2 (3)—Defence of India Rules (1939), rules 81 (2) (4) and 122——Rules framed under—Rules before amendment—Sale of sugar—Sale price exceeding price fixed—Conviction for violating orders—Provision of powers to punish not to be arrogated by Provincial Government before powers given—Illegality of—Partners of a firm punished under rule 122—Illegality of.

In respect of a sale of sugar on the 15th July, 1942, at a price in excess of that fixed by the Collector of Madras under rule 81 (2) (*b*) of the Defence of India Rules a salesman was convicted under rule 81 (4) and sentenced to pay a fine. At the time of the offence, the rule in its unamended form provided no punishment for the contravention of an order made under the rules and hence the conviction was illegal. But since there was no appeal or revision filed against it, the conviction was allowed to stand. But later the present petitioners as partners of the firm of which the accused was a clerk were charged under rule 122 of the Defence of India Rules.

Held, the power to frame rules for the punishment of offenders vests exclusively in the Central Government under section 2 (3) of the Defence of India Act and it follows that neither the Provincial Government nor its officers have any power to frame their own penal provisions. The sale of sugar by the clerk at a price exceeding that fixed by the Collector was on the 15th July, 1942, not punishable under rule 81 (4), and hence there was no contravention in respect of which the partners of the firm could be punished under rule 122 of the Defence of India Rules.

Petition praying that in the circumstances stated therein the High Court will be pleased to quash the proceedings in C. C. No. 2124 of 1942 on the file of the Court of the Chief Presidency Magistrate, Egmore, Madras.

K. S. Jayarama Ayyar for Petitioners.

C. K. Venkatanarasimham on behalf of the Crown.

The Court made the following

ORDER.—This petition to quash the proceedings in C. C. No. 2124 of 1942 on the file of the Chief Presidency Magistrate, Madras, arises in the following circumstances. In respect of a sale of sugar on 15th July, 1942, at a price in excess of that fixed by the Collector of Madras under rule 81 (2) (*b*) of the Defence of India Rules the salesman of a local shop belonging to the petitioners was convicted under rule 81 (4) of the Defence of India Rules and sentenced to pay a fine of Rs. 50. At the time of this offence rule 81 (4) in its unamended form provided no punishment for the contravention of an order made under the rules but only made punishable a contravention of the provisions of rule 81. This conviction was therefore illegal, although the fact that rule 81 (4) in its unamended form did not cover the case was not raised at the time. No appeal or revision petition was preferred and the conviction therefore stands. Subsequently the petitioners have been charged under rule 122 of the Defence of India Rules as the partners of the firm. Although the learned Crown Prosecutor concedes that the sale of the sugar by the clerk on 15th July, 1942, was not punishable under rule 81 (4) as it then stood, the amendment having been made only three days later, he contends that by the notification issued

* Crl. M. P. No. 726 of 1942. 10th December, 1942.

by the Collector of Madras on 6th June, 1942, under the powers conferred upon him by the Provincial Government under rule 81 (2) (*b*) read with section 2 (5) of the Defence of India Act, the sale was punishable.

The power to fix prices and control supplies is contained in rule 81 (2) of the Defence of India Rules read with section 2 of the Defence of India Act, and under section 2 (4) of the Act the Central Government can delegate its powers under the rules to the Provincial Government. The Provincial Government may, in its turn, under section 2 (5) of the Act confer upon their officers the powers which the Government itself possesses under this rule. It is in exercise of this power that the Collector of Madras fixed the maximum retail selling price of sugar on 6th June. The concluding paragraph of the Collector's notification is in these words :

"Any person failing to comply with these orders is liable to be punished with imprisonment for a term which may extend to three years or with fine or with both."

The power to make rules for the control and punishment of persons contravening any of the rules framed under section 2 of the Defence of India Act is contained in section 2 (3) of the Act and Mr. K. S. Jayarama Ayyar, the petitioner's learned advocate, rightly points out that although the rule-making powers under sub-section 1 of section 2 of the Act have been delegated by sub-section (4) to the Provincial Government, the power to make rules under sub-section 3 has not been conferred and therefore remains exclusively in the hands of the Central Government. The penal provisions are contained in rule 81 (4) framed by the Central Government, but the learned Crown Prosecutor contends that the power under rule 81 (2) (*b*) to control the prices at which things may be sold must include the power to punish infringements of the rules thus framed. Penal provisions, it need hardly be mentioned, must be specifically conferred where they do not already exist and they cannot be deemed to exist merely by inference or analogy. The power to frame rules for the punishment of offenders vests exclusively in the Central Government under section 2 (3) of the Act and it follows that neither the Provincial Government nor its officers have any power to frame their own penal provisions. It seems improbable that the Collector of Madras in including the penal provisions in his notification intended to arrogate to himself powers of punishment. Obviously his intention was to remind the public in a brief manner of the penal provisions already existing in the rules. It follows that the sale of the sugar by the clerk at a price exceeding that fixed by the Collector was, on 15th July, 1942, not punishable under rule 81 (4) and, therefore, there was no contravention in respect of which the partners can be punished under rule 122 of the Defence of India Rules.

This is at first sight a matter in which this Court need not interfere at this stage because there is no apparent reason why these aspects of the matter should not be raised before the learned Presidency Magistrate in defence. In answer to this Mr. Jayarama Ayyar points out that the partners live in various distant parts of the Presidency and therefore it would be inflicting upon them some hardship to compel them to go to Madras at considerable expense in order to defend a prosecution which is manifestly not maintainable.

For these reasons, the proceedings now pending before the Presidency Magistrate in C. C. No. 2124 of 1942 are ordered to be quashed.

K.C. — *Proceedings quashed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMI AYYANGAR.

C. S. Ananthanarayana Iyer .. *Appellant** (*Plff.-Applt.*)

v.

Sivaramakrishna Iyer and another .. *Respondents* (*Defts. 1 and 3-Respondents*).

Co-owners of mortgaged items of property—Partition suit—Rights and liabilities to be adjusted between the parties—Duty of Court—Determination of mutual rights not depending upon the mortgage giving possession.

* S. A. No. 201 of 1941. 3rd November, 1942.

Where an owner of an one-fourth share sued for a partition and recovery of that share against the owner of the remaining three-fourths who was also a mortgagee of the suit property as well as of certain other properties,

Held, (1) that it was the duty of the Court in such a suit to adjust the rights and liabilities *inter se* between the parties and to determine the shares on such adjustment. To ignore the liability of one of the parties to the other or others and proceed merely to effect a division without regard to it, would be to ignore the very character of the suit and the nature of the relief which the Court was bound to grant. There could be no distinction between a case of co-owners and a case of members of a joint Hindu family in this matter.

(2) The fact that the mortgage did not confer upon the mortgagee a right to possession is immaterial, where the suit is one for partition calling for the adjustment of mutual rights and liabilities.

Appeal against the decree of the District Court of Coimbatore in Appeal Suit No. 641 of 1939, preferred against the decree of the Court of the District Munsiff of Erode in Original Suit No. 553 of 1938.

D. Ramaswami Aiyangar for Appellant.

S. Nagaraja Aiyar for Respondents.

The Judgment of the Court was delivered by

Krishnaswami Ayyangar, J.—The appellant as plaintiff instituted the suit out of which this appeal has arisen for partition and recovery of an one-fourth share in a piece of wet land bearing survey No. 18-A in the village of Avadaiyaparai, Erode Taluk. He purchased this share from one Sundaram Ayyar under a sale deed dated 5th November, 1937. Sundaram Ayyar is the youngest of four brothers who are all sons of one Anantharamalinga Ayyar now deceased. The three elder brothers executed a mortgage in favour of the first respondent on 10th June, 1911, to secure the repayment of a loan of Rs. 1,500 advanced to them. The suit property was one of the items comprised in the mortgage. Six years later there was a partition in the family of the mortgagors and the arrangements then made are embodied in a partition deed dated 24th July, 1917. By that deed the properties of the family were divided among the several members of the family, namely, the father and the four brothers. The suit property amongst others fell to the share of the father, and he was given the right to enjoy them during his lifetime. Afterwards his wife was to enjoy them and after her death they were directed to be taken by the four sons in equal shares. There was also a list of family debts appended to the deed of partition which the sons undertook to discharge and among them was the mortgage debt due to the first respondent.

In 1928, the first respondent instituted O. S. No. 208 of 1928 in the Court of the Subordinate Judge of Coimbatore to enforce the mortgage impleading the mortgagors alone as defendants. In due course preliminary and final decrees were passed and the entire mortgaged properties inclusive of the land now in suit were finally brought to sale in execution and purchased by the decree-holder himself. The decree-holder—now first respondent—also obtained possession through Court on 21st April, 1934. As already indicated, Sundaram Ayyar, the vendor of the appellant, had not been made a party to the suit so as to bind his interests in the suit property. On 5th November, 1937, Sundaram Ayyar sold his one-fourth share in two items of properties, of which one was the property now in suit. On the strength of this sale deed the appellant instituted the suit out of which the present appeal arises for obtaining the reliefs mentioned. The District Munsiff who tried the suit in the first instance dismissed the suit holding that the appellant had no right to sue for partition and that his only remedy was to bring a suit for redemption of the property, which he held was liable to contribute a proportionate part of the mortgage debt. On appeal to the District Judge of Coimbatore, that decision was affirmed. Hence this second appeal.

On behalf of the appellant it was contended that the mortgage of the 10th June, 1911, executed in favour of the first respondent did not bind the interest either of the father Anantaramalinga Iyer or of his son Sundaram Ayyar as neither of them was a party to it and as by that time a division in status had been established among the members of the family. But it is clear that in the partition deed this

debt was treated as a binding liability of the family which the sons including Sundaram Ayyar undertook to discharge. It is not therefore open to the appellant to plead that the debt did not bind Sundaram Ayyar.

The only question which arises for consideration on these facts is whether the appellant should be given an unconditional decree for Sundaram Ayyar's share of the suit property without being obliged at the same time to pay a proportionate part of the mortgage debt. We are clearly of opinion that the answer should be in the negative. We have here a case of an owner of an one-fourth share suing for a partition and recovery of that share against the owner of the remaining three-fourths who was also a mortgagee of the suit property as well as of certain other properties. In such a suit it is the duty of the Court to adjust the rights and liabilities *inter se* between the parties and to determine the shares on such adjustment. To ignore the liability of one of the parties to the other or others and proceed merely to effect a division without regard to it, is to ignore the very character of the suit and the nature of the relief which the Court is bound to grant. It is conceded that such a course is not permissible in a suit for partition among the members of a joint Hindu family; but it is argued that a similar suit between co-owners stands on a different footing. We are unable to accept this distinction as sound in principle and we are not surprised that no authority has been cited in support of it.

It is next argued that even if in law the liability of Sundaram Ayyar to pay a proportionate part of the mortgage debt can be taken into account, still the liability can no longer be recognised as the debt has long since been barred by limitation. It is, however, to be observed that the prevailing view of this Court is that even if a mortgage is barred by limitation it is still available to the mortgagee as a shield to defend his possession. (Vide *Venkataramana Reddi* v. *Rangiah Chetti*[1], *Karuppan Chettiar* v. *Venkata Perumal*[2] and L. P. A. No. 24 of 1940.) Limitation does not extinguish the liability but only bars the remedy. That the mortgage in favour of the first respondent did not confer upon him a right to possession is immaterial where, as here, the suit is one for partition calling for the adjustment of mutual rights and liabilities. The decision of the Privy Council in *Bijai Saran Sahi* v. *Rudra Bageswari Prasad Bahadur Sahi*[3], which related to a simple suit for possession by an owner of the equity of redemption against a mortgagee who had no right to possession has no bearing in the present connection.

In the light of the foregoing discussion, the only decree that the appellant is entitled to, is a decree for partition and recovery of an one-fourth share in the suit property conditional on his paying into Court within 6 weeks the amount representing the *pro rata* liability of that share to contribute towards the mortgage debt, to be determined by the Court, at the time of the passing of the preliminary decree. A preliminary decree in these terms shall be substituted for the decree of the District Munsiff. The appellant has substantially failed and he must pay the costs of the first respondent in all the three courts. The parties agree that the mesne profits if any payable to the appellant shall go in discharge of the interest due by him.

K.C. ——— *Decree modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

Rao Bahadur V. Ranganathan Chettiar and others .. *Appellants** (*Applts.-Plffs.*)

v.

Mariappa Mudali and others .. *Respondents* (*Respts.-Defts.*).

Madras City Tenants Protection Act (III of 1922), section 11—Provisions applicable to Mambalam—Notice to quit not containing offer to compensate tenant—No compliance with section 11—Suit for ejectment not maintainable.

The Madras City Tenants Protection Act is intended for the protection of tenants within the limits of Madras City and Mambalam is now within those limits. Consequently tenants in Mambalam

1. (1921) 41 M.L.J. 399.
2. A.I.R. 1929 Mad. 465.
3. (1929) 58 M.L.J. 440 (P.C.).

* L. P. A. No. 5 of 1942. 23rd October, 1942.

are entitled to the benefits of the Act and so where notices to quit served on the tenants by the landlord did not contain any offer of compensation to the tenants there is no compliance with the requirements of section 11 and a suit for the ejectment of the tenants cannot be maintained.

Appeal under clause 15 of the Letters Patent against the judgment and decree of Patanjali Sastri, J., dated 24th October, 1941 and passed in C. C. C. A. No. 22 of 1940 [reported in (1942) 1 M.L.J. 92] preferred against the decree of the City Civil Court, Madras, in O. S. No. 758 of 1936.

M. E. Rajagopalachariar for Appellants.

N. Gopala Menon for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—The suit out of which this appeal arises was filed by the appellants in the City Civil Court for the ejectment of the respondents from certain lands in the Mambalam area of Madras. The appellants are the trustees of the Sri Parthasarathiswami Temple in Triplicane. Before the year 1882, the then trustees had leased to one Ramaswami Mudali an area of some eleven acres. The lessee died in 1882, leaving four sons, and the trustees decided to grant to each of them a lease of a portion of the land. Accordingly the area was divided into four plots. A part of each plot was regarded as building land and the rest agricultural land. To each brother was allotted one plot and he was treated as a yearly tenant thereof. Their respective descendants have been similarly treated. The lessees and their descendants have erected substantial buildings on their respective portions. The buildings cover nearly half of the total area. The present lessees have frequently defaulted in the payment of the rent and from time to time the respondent trustees have had to institute suits to enforce payment. In 1935 the then trustees decided to terminate the leases. Accordingly on the 21st December, 1935, notices to quit were served upon them, the notices expiring on the 30th June, 1936. They failed to comply with the notices and consequently the appellants were compelled to file the present suit for the ejectment of the defendants.

Various defences were raised. One was that the suit was bad for multifariousness and another was that it could not be maintained because the provisions of section 11 of the Madras City Tenants Protection Act, 1921, had not been complied with. The City Civil Court accepted the plea of the defendants that the suit as framed was bad for multifariousness and dismissed it on that ground. The appellants then appealed to this Court. The appeal was heard by Patanjali Sastri, J., who disagreed with the opinion of the trial Judge that the suit was bad for multifariousness, but he dismissed the appeal because he considered that the plea based on section 11 of the Madras City Tenants Protection Act was well founded. This appeal is from the learned Judge's decision, under clause 15 of the Letters Patent. We consider that the decision is correct.

Section 11 of the Madras City Tenants Protection Act says,

"No suits in ejectment or applications under section 41 of the Presidency Small Cause Courts Act, 1882, shall be instituted or presented against a tenant until the expiration of three months next after notice in writing has been given to him requiring him to surrender possession of the land and building, and offering to pay compensation for the building and trees, if any, and stating the amount thereof. A copy of such notice shall at the same time be sent to the Commissioner of the Corporation of Madras."

It is admitted that no offer of compensation was made to the respondents and therefore the notices of the 21st December, 1935, did not comply with the section.

As before Patanjali Sastri, J., the appellants say that the Act does not apply because Mambalam was incorporated in the City of Madras after it came into force. Mambalam was included in the City area by a notification dated the 18th January, 1924, and the Act came into force on the 21st February, 1922. This argument is clearly untenable. Section 1 (2) says that the Act extends to the City of Madras. Section 3 (5) of the Madras General Clauses Act, 1891, says that the expression " City of Madras " shall mean such local area as is declared from time to time to be the City of Madras under any Act for the time being in force relating to the municipal affairs of the City. The Madras City Tenants Protection Act is intended for the protection of tenants within the limits of the City. Mambalam

is now within those limits and consequently tenants in Mambalam are entitled to the benefits of the Act. The respondents are tenants of lands in Mambalam and as the appellants have not complied with section 11 of the Act they are unable to maintain the present suit.

The appeal fails and will be dismissed with costs.

K.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Pulavarthi Lakshmanaswami (deceased) and others .. *Appellants** (*Plff. & Nil*)

v.

Srimat Tirumula Peddinti Tiruvengala Raghavacharyulu, minor by maternal grandmother and guardian, Molugu Tiruvengalamma and others .. *Respondents* (*Defts. 2 & 1*).

Hindu Law—Debts—Pious obligation of son—Limits of liability—Immoral debt—Knowledge of credits if need be proved—Borrowing for needs of concubine—Whether binding on son—Madras Agriculturists' Relief Act (IV of 1938), section 3 (ii), Proviso D—Co-owner—Share of liability to be taken into account.

It is no doubt settled law that in the case of a loan advanced to the manager of a Hindu joint family if the lender makes due inquiry into the necessity for the loan, and lends the money *bona fide*, the debt is binding on the interest of all the members in the family estate although the reasonably credited necessity did not in fact exist. But when he borrows for his own private purposes without any representation, express or implied that he is borrowing for the family, he does not act on behalf of his family, and no question of his acting beyond the scope of his authority can arise and no question, therefore, of any *bona fide* lending. The Hindu law no doubt casts a pious obligation on the son to discharge his father's debts except those falling within certain categories which are usually referred to as illegal or immoral. But this obligation was based on the religious duty of the son to relieve the father from the evil consequences arising from the non-payment of his debts and was not designed for the benefit or the protection of his creditors. It follows that all that the son has to prove to establish his immunity from the pious obligation in a suit by a creditor is the immoral character of the debt, and it is not incumbent on him to show further that the creditor lent with the knowledge that the debt was contracted for an immoral purpose.

Suraj Bansi Koer v. *Sheo Prasad Singh*, (1879) L.R. 6 I.A. 88 : I.L.R. 5 Cal. 148 (P.C.); *Sat Narain* v. *Behari Lal*, (1924) 47 M.L.J. 857 : L.R. 52 I.A. 22 : I.L.R. 6 Lah. 1 (P.C.) ; *Krishnan Lal* v. *Garuddhwaja Prasad Singh*, (1899) I.L.R. 21 All. 238; *Babu Singh* v. *Behari Lal*, (1908) I.L.R. 30 All. 156 and *Savumian* v. *Narayanan Chettiar*, (1913) 23 I.C. 248 : 15 M.L.T. 372, considered.

The so-called moral duty of a paramour to provide his concubine with funds to meet her expenses will not render his borrowing for such purpose a *vyvaharika* debt as between him and his son.

In applying proviso D to section 3 (*ii*) of the Madras Agriculturists' Relief Act, 1938, to the case of a co-owner, his proportionate share of the liability has alone to be taken into consideration.

Srinivasayya v. *Obula Raju*, (1941) 2 M.L.J. 164, relied on.

Appeals against the decrees of the Court of the Subordinate Judge of Narasapur, dated 29th February, 1940 and passed in O. S. Nos. 50 and 48 of 1938, respectively.

V. Viyyanna for Appellants.

P. Satyanarayana Rao and *S. Venugopala Rao* for Respondents.

The Judgment of the Court was delivered by

Patanjali Sastri, J.—These appeals raise questions of some general importance relating to the true scope of the pious obligation of a Hindu son to discharge his father's debts.

One Viraraghavacharyulu and his brother Ramanujacharyulu were members of a joint Hindu family of which the former was the manager. Viraraghavacharyulu borrowed Rs. 2,000 from the appellant in both appeals on a promissory note, dated 18th December, 1929. The debt was renewed in 1932 by the execution of another note for Rs. 3,070-7-6 being the amount then due for principal and interest under the earlier note. A sum of Rs. 400 was paid on 23rd September, 1935 and the payment was endorsed on the note by both Viraraghavacharyulu and Ramanujacharyulu. Viraraghavacharyulu having died in 1936, the appellant sued his son and Ramanujacharyulu (O. S. No. 48 of 1938) for recovery of the balance due on the note. A. S. No. 412 of 1940 arises out of that suit. The connected appeal

*Appeals Nos. 383 and 412 of 1940. 23rd October, 1942.

A. S. No. 383 of 1940 arises out of another suit (O. S. No. 50 of 1938) brought by the appellant against the same defendants to enforce payment of the balance of principal and interest due on a promissory note for Rs. 16,051-15-0 executed by both the brothers on 16th October, 1933. This note was given in renewal of an earlier note for Rs. 9,500 also executed by both of them. In this sum was included Rs. 1,563-15-0 being the principal and interest due under a promissory note executed by Viraraghavacharyulu alone for Rs. 1,000 on 20th December, 1926. The main defence in the first suit was that the debt was borrowed by Viraraghavacharyulu for payment to his concubine for meeting the expenses of her grand-daughter's marriage and that it could not therefore bind the defendants or their family properties. The defendants also pleaded that they are agriculturists within the meaning of the Madras Agriculturists' Relief Act and as such were entitled in any event to have the debt scaled down in accordance with the provisions of that Act. In the second suit also the defendants claimed relief under the Act as agriculturists, and in addition the son pleaded that a portion of the sum borrowed having been utilised for discharging a debt due to a third party from whom Viraraghavacharyulu had borrowed monies for payment to his concubine, the debt could not bind the family properties in the hands of the son. By consent of parties, both suits were tried together, the evidence being recorded in O. S. No. 50 of 1938.

The Court below has found that the debt sued for in O. S. No. 48 of 1938 was incurred by Viraraghavacharyulu for payment to his concubine one Saradamba for meeting the expenses of the marriage of her grand-daughter and must therefore be deemed to have been contracted for an immoral purpose ; but he held that the debt was binding on the family property in the hands of the son as the appellant was a *bona fide* lender without knowledge of the purpose for which the amount was borrowed. On the question as to the agriculturist status of the defendants, the learned Judge held that they were disqualified under Proviso D to section 3 (*ii*) of the Act from claiming its benefits as they were the holders of an estate called Dumpagadapa agraharam in respect of which they paid more than Rs. 100 an quitrent to the Government. He held, however, that the rate of interest charged, namely, Rs. 1-9-6 per cent. per month compound was substantially unfair and reduced it to nine per cent. per annum, simple, and passed a decree accordingly against the family properties in the hands of the son and dismissed the suit so far as Ramanujacharyulu was concerned. In the second suit, the learned Judge found that a sum of Rs. 1,874-12-0 out of the amount borrowed under the suit promissory note (Ex. A) was paid in discharge of a debt due to D. W. 2 under an earlier note for Rs. 2,000 (Ex. XVI) executed by Viraraghavacharyulu and that the sum borrowed from D. W. 2 was also paid by Viraraghavacharyulu to Saradamba in connection with her grand-daughter's marriage. He held however that the debt as a whole was binding on the family properties in the hands of the son as the appellant advanced the loan *bona fide*, as in the other case, without any knowledge that part of the amount borrowed was to be applied in discharge of the promissory note, Ex. XVI. He reduced the rate of interest from Rs. 1-13-6 per cent. per mensem compound to nine per cent. per annum simple and passed a decree for the amount found payable against Ramanujacharyulu personally and against the family properties in the hands of the son. Not being satisfied with these decrees, the appellant has brought the present appeals to this Court and the respondents have preferred a memorandum of cross-objections in each appeal as regards the points decided against them in the Court below.

In A. S. No. 412 learned counsel for the appellant endeavoured to show that Ramanujacharyulu was also liable for the debt by reason of his having signed the endorsement of payment of Rs. 400 in the suit promissory note (Ex. B). As stated above, this promissory note was executed by Viraraghavacharyulu alone in renewal of an earlier note (Ex. A) executed by him. It is difficult to see therefore how Ramanujacharyulu could be made liable for a debt borrowed by his elder brother not for any family purpose but for a private purpose of his own. It was suggested that, by signing the endorsement of payment along with his brother, he must be taken to have made a representation to the creditor that the borrowing was for a

purpose binding on him also, that such implied representation must have led the appellant to defer his action on the note, and that therefore Ramanujacharyulu was estopped from denying his liability. We are unable to appreciate this argument. The endorsement was made in September, 1935, long after the loan had been originally advanced in 1929, and it is difficult to see how a representation supposed to have been made at the time of such endorsement can give rise to a liability by estoppel ; nor is there any warrant for inferring such a representation from the mere fact of Ramanujacharyulu signing the endorsement of payment. It was not suggested that any such representation was actually made by him at the time or that the appellant agreed to defer suit if Ramanujacharyulu undertook liability and signed the endorsement on the note. We have no hesitation in rejecting this contention.

The second contention is hardly more sustainable. It was submitted that there was no clear proof that the borrowings by Viraraghavacharyulu under Ex. B and under Ex. XVI were for payment to Saradamba. It is true that there is no direct evidence that the sums borrowed under these promissory notes were the identical amounts paid to Saradamba. But the evidence hardly leaves any room for doubt on the point. Rs. 2,000 was borrowed on 18th December, 1929, under each of these notes and the family accounts show that on the very next day a sum of Rs. 4,000 was debited as paid to Saradamba. No attempt has been made to show that Viraraghavacharyulu had other funds on hand out of which he could have made the payment. In such circumstances, the conclusion is irresistible that the amounts borrowed under the notes were utilised for making the payment to her.

Even so, it was said, the purpose of the borrowings could not be regarded as immoral under the Hindu law as it appeared that Saradamba was in the continuous and exclusive keeping of Viraraghavacharyulu and was thus an *avaruddhastri* within the meaning of Hindu law texts, which recognise her status and provide for her maintenance. It was indeed suggested that Viraraghavacharyulu was 'morally' bound to meet the expenses of her grand-daughter's marriage. This argument is based on an obvious fallacy and cannot be accepted. The fact that Hindu law, like some other ancient systems of law, recognises and makes provision for certain human frailties cannot be taken as elevating them to the plane of good morals. Nor can the so-called moral duty of a paramour to provide his concubine with funds to meet her expenses render his borrowing for the purpose a *vyavaharika* debt as between him and his son.

The appellant next objected to the reduction of the rate of interest to nine per cent. simple throughout as unwarranted in the circumstances of the case. He does not however seek to recover interest at the contract rate which comes to more than twenty per cent. per annum compound but claims only 10½ per cent. compound and has valued his appeal on that basis. It is however unnecessary to consider this point as we are holding that the respondents are entitled to the benefits of the Madras Agriculturists' Relief Act which wipes out all interest outstanding on 1st October, 1937 and reduces subsequent interest to the rate of 6¼ per cent. per annum where a higher rate has been stipulated.

Turning now to the memorandum of cross-objections filed in each of these appeals, the first contention was that the learned Subordinate Judge erred in granting a decree to the appellant against the family properties in the hands of the son even for the sums found to have been advanced to the father for an immoral purpose as the son failed to show that the advances were made with knowledge of such purpose. It was urged that it was sufficient for the son to prove, in order to avoid liability for his father's debt, that it was contracted for an immoral purpose and that it was not incumbent on him also to establish that the creditor had knowledge of such purpose. This contention is supported by the decision of this Court (Miller and Oldfield, JJ.) in *Savumian* v. *Narayanan Chettiar*[1], although the headnote makes no reference to this point. We should have followed this decision, holding the

1. (1913) 23 I.C. 248 : 15 M.L.T. 372.

point concluded against the appellant, but we were strongly pressed by his learned counsel with certain observations of the Privy Council in the later decision in *Satnarain* v. *Behari Lal*[1] and the statement of the law based thereon in Mulla's Principles of Hindu Law (9th edition), page 339. We have therefore thought it necessary to examine the point afresh on principle and on authority.

It is no doubt settled law that in the case of a loan advanced to the manager of a Hindu joint family if the lender makes due inquiry into the necessity for the loan and lends the money *bona fide*, the debt is binding on the interest of all the members in the family estate although the reasonably credited necessity did not in fact exist. This rule is based on the qualified power of the manager or the representative of the family to borrow so as to bind all the members of the family only under certain circumstances which are in their nature variable and are often compendiously referred to as family necessity or benefit. In such a case if the creditor lends honestly after satisfying himself that the borrower is acting within the limits of his authority, the borrowing is regarded as duly authorised and, therefore, as binding on the other persons on whose behalf he purports to borrow. The principle is embodied, as regards transfers of immovable property, in section 38 of the Transfer of Property Act which has now been made applicable to Hindus. In so far as the father is also the manager of the family, the same rule of course applies when he purports to borrow for an alleged family purpose. But when he borrows for his own private purposes without any representation, express or implied that he is borrowing for the family, he does not act on behalf of his family, and no question of his acting beyond the scope of his authority can arise and no question, therefore, of any *bona fide* lending. The Hindu law no doubt casts a pious obligation on the son to discharge his father's debts except those falling within certain categories which are usually referred to as illegal or immoral. But this obligation, it is well to remember, was based on the religious duty of the son to relieve the father from the evil consequences arising from the non-payment of his debts and was not designed for the benefit or the protection of his creditors ; and, similarly, an examination of the Smrithi texts relating to the excepted categories shows that they are based solely on the impropriety of the father's conduct in contracting the debt, and have no reference to the propriety or otherwise of the creditor's conduct in advancing the loan. The position, therefore, is that if the father's debt is free from taint, a pious duty is laid on the son to rescue the father from the penalties of indebtedness the resulting advantage to the creditor being purely incidental; if, on the other hand, the debt originates in the father's misconduct the pious duty ceases to operate, and the son is not bound to pay off the debt, however *bona fide* the creditor may have been in advancing the loan. It follows that all that the son has to prove to establish his immunity from the pious obligation in a suit by the creditor is the immoral character of the debt, and it is not incumbent on him to show further that the creditor lent with the knowledge that the debt was contracted for an immoral purpose.

It remains to see whether the authorities relied on for the appellant compel a different conclusion. As already observed, reference was made to hMulla's Principles of Hindu Law where it is stated at page 339,

> " It is open to the son in such a suit (a creditor's suit against father and son) to show that the debt was incurred by the father *to the knowledge of the lender* for an immoral purpose and to resist a decree against his share on that ground." (*Italics ours.*)

The Privy Council decision in *Satnarain* v. *Behari Lal*[1] is cited in support of this proposition. In that case their Lordships observe as follows :

> " When the decree which was executed was made in a suit to which the sons were not parties and the property sold was the joint property of the father and the son, the sale was good on the principle of Hindu law that it is the pious duty of a Hindu son to pay his father's debts unless it is shown that the debt in respect of which the decree was made was contracted by the father to the knowledge of the *lender* for the purposes of immorality." (*Italics ours.*)

The reference in this passage to the lender is perhaps an inadvertent slip as it is difficult to see how the lender's knowledge of the immoral purpose can render the

1. (1924) 47 M.L.J. 857 : L.R. 52 I.A. 22 : I.L.R. 6 Lah. 1 (P.C.).

sale bad if the execution purchaser had no knowledge of such purpose and purchased the property *bona fide* for valuable consideration. The knowledge of the *purchaser* was held by their Lordships to be the determining factor in such cases (see *Girdharee Lal* v. *Kantoo Lal*[1] and *Suraj Bansi Koer* v. *Sheo Prasad Singh*[2]) and we cannot believe that their Lordships intended to lay down a different rule when they referred in passing to this subject in discussing a question arising under the Presidency Towns Insolvency Act. However that may be, their Lordships made these remarks with reference to family property sold in execution of a decree obtained against the father as to which different considerations arise, a *bona fide* purchaser not being bound to go further back then the decree (*Suraj Bansi Koer* v. *Sheo Prasad Singh*[2]). We notice that in the earlier edition of the work, also by the same editor, the proposition is stated without reference to the knowledge of the lender, as evidently the decision in *Satnarain* v. *Behari Lal*[3] was not then regarded as an authority requiring the son to prove also the lender's knowledge of the immoral purpose of the loan if he seeks to escape from having his interest in the family estate affected by the decree.

The other cases brought to our notice by the appellant's learned counsel as supporting his contention are *Krishnan Lal* v. *Garudhwaja Prasad Singh*[4] and *Babu Singh* v. *Behari Lal*[5]. In the former case the Court found that the debt was not shown to have been contracted by the father for an immoral purpose. The observations, therefore, of Burkitt, J., who delivered the judgment of the Bench that—

> " had it been proved that the debt had been contracted for immoral purposes and that the person who advanced the money was aware of the purpose for which it was being borrowed, the sons would not have been liable,"

must be regarded as purely *obiter*. In *Babu Singh* v. *Behari Lal*[5], the point decided was that the burden of proving that the father's debt was contracted for immoral purposes lay on the son and reference was made in the course of the judgment to the observations of Burkitt, J., quoted above as supporting that view. We do not consider that these decisions are of much assistance to the appellant. On the other hand, that Court had to consider the question in *Maharajah Singh* v. *Balwant Singh*[6] and after an elaborate examination of the cases bearing on the point the learned Judges, of whom, it may be noted, Burkitt, J., was one, expressed the opinion—

> " We know of no express authority for the proposition advanced by Mr. Sundar Lal that a son who disputes his liability to pay his father's debt contracted for immoral purposes must ordinarily prove that the lender was aware of the object for which the money was borrowed, though there is the highest authority that he must do so if he is attempting to recover ancestral property which has already passed out of the family."

Again they observed at page 544—

> " It is no easy matter for sons to satisfy the heavy *onus* which lies upon them in impeaching loans obtained for immoral purposes, but it would, we think, be the death-blow to the rule of Hindu law, which gives immunity to sons when defending their title to ancestral property from liability to their father's immoral debts, if it were the law that in order to absolve themselves from liability the sons must prove, not merely the purpose for which such loans were contracted, but also that the lenders knew of the immoral purpose of the loan."

We respectfully agree with this observation.

It only remains to consider the respondents' claim to relief under the Madras Agriculturists' Relief Act. The respondents are admittedly the owners of an agraharam village called Dumpagadapa exclusive of certain minor inams situated therein. It is also common ground that a sum of Rs. 205 is payable to the Government as quitrent in respect of the village. It appears that the respondents have alienated portions of the agraharam and after such alienation, the proportionate liability which they have to bear as between themselves and the alienees is Rs. 149. The respondents would therefore be disqualified under proviso D to section 3 (*ii*) assuming the agraharam to be an estate from claiming the benefits of the Act

---

1. (1874) L.R. 1 I.A. 321.
2. (1879) L.R. 6 I.A. 88 : I.L.R. 5 Cal. 148 (P.C.).
3. (1924) 47 M.L.J. 857 : L.R. 52 I.A. 22 : I.L.R. 6 Lah. 1 (P.C.).
4. (1899) I.L.R. 21 All. 238.
5. (1908) I.L.R. 30 All. 156.
6. (1906) I.L.R. 28 All. 508 at 521.

unless Viraraghavacharyulu and his brother became divided in status in 1935 as alleged by the respondents so that the proportionate liability of each would be reduced to below Rs. 100. The learned Subordinate Judge has not made a definite finding on this point as he took the view that the respondents being jointly and severally liable to the Government for the whole quit rent of Rs. 205, each of them would be liable to pay more than Rs. 100 even if there was a division in status between the brothers—a view which cannot be supported after the decision of this Court in *Srinivasayya* v. *Obula Raju*[1], holding that a co-owner's proportionate share of the liability has alone to be taken into consideration in applying the proviso. We have therefore to determine whether the alleged division in status is true. The respondents relied mainly upon entries in the family accounts and upon Ex. XXIV which purports to be an agreement between the brothers to enjoy the income of the family properties in separate shares. Mr. Viyyanna for the appellant frankly conceded that if Ex. XXIV was to be accepted as genuine, it would establish that the brothers became divided in status from its date. The agreement is written on the last two pages of Ex. XXIV which is the family day book for the years 1935 and 1936. It purports to be in the handwriting of the family clerk (D.W. 4) and to bear the initials of Viraraghavacharyulu and the full signature of Ramanujacharyulu. Mr. Viyyanna strongly attacked the genuineness of this document suggesting that it must have been fabricated for the purpose of the suit. He pointed out that Ex. XXIV was not filed in Court till after the commencement of the trial, and that the agreement was written on the last two pages of the written portion of the day book. While these circumstances no doubt suggest caution in accepting the document as genuine, we have come to the conclusion, on a consideration of the entire evidence and the general probabilities of the case, that the document is genuine. We have already seen that Viraraghavacharyulu was borrowing large sums of money for payment to his concubine Saradamba in whose name a separate folio was opened in the family ledger showing disbursements made to her from time to time. It is also in evidence that he had alienated some family lands to her. This conduct of Viraraghavacharyulu naturally led to misunderstandings and disputes between the brothers and an actual partition of the properties had to be put off only because their old mother had sentimental objections to her sons dividing the properties during her lifetime. The appellant himself admitted in the course of his cross-examination that in 1934 the brothers went to him as a mediator in connection with their disputes about monies being paid out of family funds to Saradamba, that Ramanujacharyulu told the appellant at the time that he was not going to remain joint with his elder brother any longer and that the assets and liabilities should be divided so that he might discharge his share of the family debts. Even if this statement of Ramanujacharyulu spoken to by the appellant is not to be regarded as effecting by itself a division in status as suggested for the respondents, it clearly shows that Ramanujacharyulu felt aggrieved by the conduct of his brother and was anxious to separate from him in order to protect his interests in the family properties. This background renders highly probable the respondents' case of division in 1935. There is also clear evidence that since 1935, the brothers were separate in mess and, what is more significant, separate folios were opened in the family accounts for the two branches and the entries therein show that the expenses as well as the income were periodically divided in equal shares between the two branches of the family. We have therefore no hesitation in holding that the brothers became divided in status in 1935, and the quit rent payable by each of the respondents in respect of his share of the lands in the agraharam being in that case less than Rs. 100, proviso D does not apply and the respondents are entitled to the benefits of the Act. In this view, it becomes unnecessary to deal with the further question raised as to whether Dumpagadapa agraharam can be regarded as an "estate" within the meaning of the Madras Estates Land Act as amended by the Amendment Act of 1934, notwithstanding the grant of portions thereof as devadayam inams to certain temples in the village.

1. (1941) 2 M.L.J. 164.

The contention that Act IV of 1938 is *ultra vires* the Local Legislature so far as it affects Negotiable Instruments and therefore cannot apply to the suit debts is concluded against the appellant by the Full Bench decision in *Nagaratnam* v. *Seshayya*[1].

In the result, the appeals fail and are dismissed with costs, advocate's fee one set; and the memoranda of cross-objections are allowed with costs; advocate's fee one set.

As the last contention involves a substantial question of law as to the interpretation of the Government of India Act, 1935, we certify accordingly under section 205 of that Act.

B.V.V. ——— *Appeals dismissed: Cross-objections allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUPPUSWAMI AYYAR.

Dondu Subbaraju and others .. *Appellants** (*Plffs.*)

v.

Sri Rudraraju Venkatraju (died) and others .. *Respondents* (*Defts.*).

Madras Estates Land Act (I of 1908), section 173—Suit under—Agreement between zamindar and ryots—Mamul wet localised and water rate fixed—Validity of agreement—Extra payment whether constitutes enhancement of rent—Failure to record same in record of rights—Suit to fix fair rent—Maintainability.

In a zamindari village the Government collected water rate in respect of additional lands brought under cultivation as wet by charging a definite sum of money per acre irrigated over and above the extent which was mamul wet. And the amount so collected was being distributed among the various ryots without any reference to the mamul wet lands. The original mamul wet was not localised and there were disputes between the zamindar and ryots regarding the same. While so, in consideration of the zamindar localising the mamul wet land it was agreed that the ryots holding the mamul wet lands should in future pay only Rs. 2-8-0 instead of Rs. 5 per acre which they were paying and that neither party should have the right to revise the rate so agreed upon. In suits filed under section 173 of the Estates Land Act the tenants contended that in deciding the amount of fair rent the water rate agreed upon should be deducted.

Held, that the agreement between the zamindar and the ryots for payment of the water rate was not one for enhancement of rent, but was one for the additional advantage of localising the mamul wet land and it was consequently not illegal.

Battina Appanna v. *Raja Yarlagadda*, (1917) 33 M.L.J. 355 and *Duraiswami Gurukkal* v. *Subramania Gurukkal*, (1927) 54 M.L.J. 361 : I.L.R. 51 Mad. 266 (F.B.), referred to.

Held, further, that the omission to note the agreement in the record of rights was a valid ground for the filing of the suits under section 173 (3) of the Estates Land Act and that the Court should fix the rate of rent after taking into account the water rate payable under the agreement.

Zamindar of Kallikote v. *Beero Pollai*, (1935) 71 M.L.J. 118 : I.L.R. 59 Mad. 825 (F.B.), referred to.

Appeals against the decrees of the Court of the Subordinate Judge of Narasapur, in A. S. Nos. 4, etc., of 1938, preferred against the decrees of the Court of the District Munsiff of Narasapur, in O. S. Nos. 74, etc., of 1935.

P. Satyanarayana Rao and *S. Venugopala Rao* for Appellants.

K. Venkatarama Raju for Respondents.

The Court delivered the following

JUDGMENT.—These appeals arise out of suits filed by tenants under section 173 of the Estates Land Act and the arguments were confined to the claim in respect of mamul wet lands, and the ground for interference is also confined to the complaint that the Settlement Officer, in the proceedings taken under Chapter XI of the Estates Land Act, did not note in the Record of Rights an agreement entered into in 1926 between the landlord and the ryot under which the water rate payable by them in respect of the *mamul* wet land was to be Rs. 2-8-0 per acre with no right in either party to claim a revision of the same and that the rent has been settled without giving effect to this agreement. The zamindar's contention was that the agreement was not valid and binding, that it was not binding on the officer who settled the rents under Chapter XI of the Estates Land Act and that this suit was not maintainable in respect of this relief.

1. (1939) 1 M.L.J. 272 : I.L.R. (1939) Mad. 151 (F.B.).

* S. A. Nos. 99 to 105 of 1939. 9th July, 1942.

The subject-matter of these appeals are lands situate in the village of Neredumilli. The kudicat in the village comprised 625.49 acres out of which 228.1 was mamul wet. When the delta system was introduced the original source of irrigation in several of these zamindari villages had to be interfered with. But in consideration of the same, Government collected water rate in respect of the additional lands brought under cultivation as wet by charging a definite sum of money per acre irrigated over and above the extent, which was mamul wet. The amount so collected in respect of this village from the zamindar was being distributed among the various ryots whose lands were cultivated with water supplied by the delta system of irrigation. Such a system ignored the claim of the ryots in respect of mamul wet. The original mamul wet was not localised, and hence it was that Government had to levy a water rate on the entire area irrigated by the new system *minus* the old wet instead of levying it on the area of the lands that were brought under wet cultivation subsequent to the introduction of the delta system. There were disputes between the zamindar and the ryots in respect of the mamul wet lands and in consideration of the zamindar localising the mamul wet lands it was agreed that the ryots holding the mamul wet lands should in future pay only Rs. 2-8-0 instead of the Rs. 5 per acre which they were paying and that neither party could have any right to revise the water rate of Rs. 2-8-0 per acre agreed to be paid. It is a finding of fact and is not disputed in this Court. Subsequently there was a settlement of accounts in respect of the rents payable for the various lands in the village. The ryots of the lands in dispute in these appeals wanted the Settlement Officer to note in the Record of Rights that there was this agreement and they wanted the agreement to be given effect to in fixing the amount payable as rent. Though the officer stated that it was not necessary at that stage to enter it in the record of rights and that it would be considered in fixing the amounts, he did not give effect to it in settling the rent of these lands. The appellants in all these cases therefore had to file suits and these suits related not only to mamul wet lands but to other lands as well. There were other grounds also on which the suits were based; but they have all been found against, and they are not pressed in this Court, the claim being confined in this Court only to mamul wet lands, and the ground of attack being confined to the failure to note in the record of rights the special agreement with regard to water rate.

The first Court found that the agreement was true and valid, that it was a special condition in respect of a holding at a favourable rate and that the omission to show it in the record of rights was a sufficient ground for filing a suit under section 173, and as this agreement had been ignored in arriving at the fair and equitable rent, he directed Rs. 2-8-0 per acre to be deducted out of the rent settled and gave a decree accordingly. The lower appellate Court held that the agreement was void against the ryots inasmuch as it effected a permanent enhancement of the rent payable to the landholder that it was not one protected by section 26 and that such an agreement cannot override the powers of the revenue authorities in settling a fair and equitable rent. He negatived the ryots' claim in respect of the mamul wet lands and set aside the lower Court's decree with regard to them.

As already pointed out above the genuineness of the agreement is not disputed in this Court. As a matter of fact it was noted in the various pattas issued before the rents were settled. Section 3 (11) of the Estates Land Act defines rent and it includes "whatever is payable on account of water supplied by the landholder." The agreement in question therefore was an agreement with regard to a portion of the rent payable. There is nothing illegal about it, for it was not an agreement to pay an enhanced rent. Water rate levied on these ryots prior to the agreement was Rs. 5 per acre and in consideration of the zamindar agreeing to localise the mamul wet lands the ryot agreed to pay Rs. 2-8-0 per acre, and it was not to be revised. That an agreement to pay a definite sum is not one for enhancement of rent and is not illegal as such is clear from the decision in *Battina Appanna* v. *Raja Yarlagadda*[1]. In this case the payment was agreed to be made in consideration

1. (1917) 33 M.L.J. 355.

of the zamindar localising the mamul wet, for when it is localised it would not be open to the Government to charge any water rate on it. The only person who can do the localisation was the zamindar, and since he agreed to do it, there was consideration for the contract. In *Duraiswami Gurukkal* v. *Subramania Gurukkal*[1], it was held by a Full Bench of this Court that where a ryot uses for the cultivation of his land water from a Government source, and for the use of water that is taken Government requires some amount as and by way of water cess from the zamindar, the claim of the latter to recover such amount from the ryot was not a claim for enhancement of rent. This is a case where the extra payment has been made for the additional advantage of localising the mamul wet which the zamindar could do if he chooses. It was pointed out in *Duraiswami Gurukkal* v. *Subramania Gurukkal*[1] that where there were new circumstances they required adjustment and if any sum is agreed to be paid in connection with it, it could not be said to be an enhancement of rent. Till now they were paying Rs. 5 because the lands were not localised and as the zamindar agreed to localise, which was a new circumstance, it required an adjustment, and there was an agreement to pay only two rupees eight annas per acre.

The same principle was affirmed in *Venkatraju* v. *Maharaja of Pithapuram*[2].

The lower appellate Court refers to an objection under section 26 of the Estates Land Act. But it is conceded that that section has no application to the facts of this case. The zamindar who entered into the agreement is the present zamindar, and during his lifetime it would not be open to him to dispute the validity of the agreement referred to above. It may not be binding on his successors and the first Court has referred to this circumstance and it is not necessary at this stage to decide it.

The next question for consideration is whether there was an omission to note this in the record of rights and whether this omission was a proper ground for the filing of the suits under section 173. The ryots no doubt complained in their plaint that in the record of rights the officer omitted to note what the rent that was payable at the time the record was being prepared was and whether the ryot was entitled to the benefits of proviso (*a*) to clause (1) of section 30 and that he also failed to note how the rent had been fixed, whether by decree or by the provisions of this Act or otherwise and whether there was any right incident to the holding and that the omission to note them in the record of rights was one of the grounds specified in section 173, clause 3 (*d*). But then as pointed out by the first Court this was not one of the entries directed to be made by the Government in its notification when it directed the preparation of the record of rights. It is open to the Government to direct what particulars should be recorded, and in this case as pointed out in Ex. J-1, the order of the Sub-Collector, Narasapur, regarding the preparation of the record of rights in question, the items mentioned in the latter portion of section 165, clause (*e*) and in section 165 (*f*) were not included. Consequently the omission to note these particulars cannot entitle the plaintiff to invoke the benefit of section 173, clause (*d*). But as pointed out by the learned District Munsiff the agreement amounts to a special condition in respect of the holding at a favourable rate, and omission to note it will bring the case under section 173, clause 3 (*f*). Till the date of the agreement they were paying at Rs. 5 per acre irrespective of the fact that the lands were mamul wet lands because they had not been localised. By entering into an agreement the zamindar undertook to localise these lands which act enabled them to escape from the liability to pay the Government water cess on their lands, and in consideration of the same they agreed to pay Rs. 2-8-0 instead of Rs. 5 in future to the zamindar. This is therefore a special agreement under which they were able to have a favourable water rate, that is to say, a rate lower than what they were paying till then after the delta system came into force. It is admitted that under the terms of the agreement noted in the various pattas issued by the zamindar the rate was not liable to be revised, at any rate during the lifetime of the present zamindar. Consequently the omission

---

1. (1927) 54 M.L.J. 361 : I.L.R. 51 Mad. 266 (F.B.).

2. (1938) 1 M.L.J. 256 : I.L.R. (1938) Mad. 381 (F.B.).

entitled the plaintiff to file a suit in respect of these mamul wet lands under section 173.

The scope of the suit and the relief that could be granted in a suit filed by a ryot under that section is fully dealt with in *Zamindar of Kallikote* v. *Beero Pollai*[1]. After pointing out how wrong entries in the record of rights might lead to a settlement on a wrong basis it is pointed out at page 845 that where the ground of attack in the suit is that stated in clause (*e*) the Court has to decide what the entry shall be having regard to the finding in the particular matter, and if the Court finds that one or more of such data on which the rent fixed by the Revenue Officer was wrong in fact, it shall make the necessary consequential alteration, and that is exactly what the learned District Munsiff has done in this case. No doubt in the order of the Sub-Collector dated 25th April, 1933, he stated that the agreement would be considered when the rents are settled. This is what he says :

> " There is no need therefore to record the agreement which is alleged to be the basis of the existing rent noted in the draft record. The point will arise only in connection with the further stage ; the settlement of rents will be duly considered then. The present petition is dismissed."

But in the order settling the rent there is the following passage :

> " For mamul wet lands water rate was added to dry rate of rent. Even in this water rate there was no equity. On some lands (a majority) a water rate of Rs. 2-8-0 an acre was added to the dry rate of rent. In some cases a rate of Rs. 5 was added. In some cases of mamul wet the ryots have not been paying any water rate at all. The ryots lay stress on the condition in the pattas and muchilikas exchanged in respect of mamul wet lands that neither the proprietors nor the ryots should claim for enhancement or reduction of the amount of water tax agreed upon them. I doubt if this compromise comes within the scope of section 168 (4) of the Estates Land Act since it was not made during these settlement operations and even if it is construed to come under section 168 (4), I am not satisfied that the amount according to the compromise is either fair or equitable and I therefore hold that fair and equitable rates of rent have now to be fixed."

At the end of paragraph 13 this is what he says :

> " How far the agreement is to be respected in these settlement operations was discussed in para. 6 above and I do not consider it as a limitation for settling fair and equitable rents under section 168 of the Estates Land Act."

It is therefore clear that in settling the rent the officer considered the agreement to be neither fair nor equitable and ignored it and fixed the rent on the basis of the rent prevailing in the adjoining villages. The learned District Munsiff in paragraph 26 of his judgment observes :

> " I have no doubt that the present rate settled per acre for mamul wet lands took into consideration the full water rate of Rs. 5 as the reasonable and fair sum. Having regard to the agreement during the lifetime of the present proprietors, I hold that there is a special condition for a favourable rate with reference to the water tax and the consolidated rent should be deemed to be in excess of this agreement by Rs. 2-8-0 per acre."

And he directed the rent to be reduced by Rs. 2-8-0 per acre. The learned District Munsiff therefore proceeded on the basis that in settling the accounts the water rate was taken to be Rs. 5 instead of Rs. 2-8-0 and the fair rent fixed accordingly. I have already pointed out the portions of the order of the officer settling the rent indicating that it was so. It is also significant that in the grounds of appeal filed in the lower appellate Court no objection was taken to this statement in the judgment of the District Munsiff.

The decisions in *Valluri Narasimharao* v. *Ryots of Peddamidipalli*[2] and *Ryots of Garabanda, etc., villages* v. *Zamindar of Parlakimidi*[3] referred to by the learned Subordinate Judge have no application to the facts of this case. All that was stated there was that in settling a fair and equitable rate of rent under Chapter XI, section 168 of the Estates Land Act was not bound by the limitation of section 30 of the Act relating to the enhancement of rent. It was so held because the proviso to section 30 applied only to the petitions for enhancement filed under that section. It is unnecessary to refer to other cases cited. All that was found in them was that the powers of an officer settling the rents are wide and that Courts cannot interfere with it. But even in this case the Civil Court has jurisdiction to interfere because the Settlement Officer refused to comply with a statutory liability. He was bound

1. (1935) 71 M.L.J. 118 : I.L.R. 59 Mad. 825 (F.B.).
2. (1925) I.L.R. 49 Mad. 499.
3. (1938) 1 M.L.J. 68 : I L.R. (1938) Mad. 858.

to have entered in the record of rights this special condition with respect to the holding, namely, that the water rate payable was Rs. 2-8-0 and that it was not liable to be revised at any rate during the lifetime of the present zamindar. Consequently it entitled the plaintiffs to come forward with suits under section 173, clause 3 (*e*). The Court thus became seized with jurisdiction over the dispute and when it noticed that there was a mistake and that the rent was fixed on a wrong basis ignoring the agreement it was entitled to correct it.

In these circumstances I find that the learned Subordinate Judge was wrong in finding that the agreement was void and that the Settlement Officer was entitled to ignore it while settling the rent. I therefore set aside the decree of the lower appellate Court with regard to the mamul wet lands which are the subject-matter of these appeals and restore the decree of the trial Court in respect of the same. The zamindar-respondent will pay the appellant proportionate costs in this Court as well as in the lower appellate Court on the portion of the claim allowed.

Leave refused.

B.V.V. — *Appeals allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNASWAMI AYYANGAR AND MR. JUSTICE KUNHI RAMAN.

O. A. Narayanaswami Ayyar .. *Appellant** (*Petitioner*)

v.

S. A. Narayana Iyengar and others .. *Respondents* (*Respts.*).

Civil Procedure Code (*V of 1908*), *section 145—Application independently of section 145 by surety for cancellation of his bond on the ground that it had become discharged by happening of subsequent events—Court to which bond was executed has jurisdiction to decide.*

Where a surety does not dispute the validity of the bond when it was executed but only states that by reason of the events that subsequently happened it had become discharged and on that ground applies for cancellation of the bond, the question properly falls within the jurisdiction of the Court in whose favour the bond had been executed. Such an application can be filed by the surety even before the bond is sought to be enforced against him in execution. Section 145 of the Civil Procedure Code does not impose a bar to the surety invoking the aid of the Court independently of an application under section 145.

Ramanatham Pillai v. *Doraiswami Ayyangar*, (1919) 38 M.L.J. 65 : I.L.R. 43 Mad. 325, distinguished.

Appeals against the orders of the District Court of West Tanjore, dated 10th July, 1939 and made in E. P. No. 48 of 1938 in O. S. No. 3 of 1919, etc.

A. V. Viswanatha Sastri for Appellant.

K. S. Champakesa Aiyangar, *K. V. Ramachandra Aiyar* and *K. C. Srinivasan* for Respondents.

The Court delivered the following

JUDGMENT.—These two appeals have been filed against the orders of the District Judge of West Tanjore dismissing two execution petitions in both of which the receiver appointed in E. P. No. 82 of 1934 was the petitioner. In O. S. No. 26 of 1912 which was an interpleader suit on the file of the Sub-Court, Tanjore, instituted to determine the rights of the several claimants to the Tanjore Palace estate, the first defendant, the senior prince, obtained a decree for a one-eighth share and his younger brother, the second defendant, for another one-eighth share. The balance of the estate, namely, three-fourths was decreed to the illegitimate sons of the late Maharajah, compendiously referred to as the Mangalavilas group. There were appeals preferred to this Court against the decision of the Sub-Court, Tanjore. The result was that the shares of defendants 1 and 2 were enhanced from one-eighth to two-sevenths and the shares of the Mangalavilas group, were correspondingly reduced. These latter consisted of six branches and each branch got an one-fourteenth share. The sum total of the shares of these branches amounted to three-sevenths. The estate under litigation consisted not only of extensive

* A. A. O. Nos. 161 and 162 of 1940. 15th July, 1942.

immovable properties but also comprised a sum of 20 lakhs of rupees collected and deposited into Court by a receiver appointed pending the disposal of O. S. No. 26 of 1912. When the appeals were pending in this Court the successful parties were permitted by order dated 7th November, 1919, to draw their respective shares in the fund in Court deposit, on their furnishing sufficient security. Under this order the Mangalavilas group consisting of defendants 5, 8 to 11, 25, 26, 27, 28 and 29 applied for and obtained their shares of the money in Court as determined by the decree of the trial Court. As a consequence of the modification introduced by the decree of this Court on appeal which reduced the quantum of their share to three-sevenths instead of three-fourths, the Mangalavilas group became liable to refund the difference. Each of the six branches had accordingly to bring back into Court an amount represented by the difference between the one-eighth and one-fourteenth shares and this liability was ascertained and embodied in the final decree passed by the District Court, West Tanjore, to which Court O. S. No. 26 of 1912 was withdrawn, the suit being thereupon re-numbered as O. S. No. 3 of 1919. It may be mentioned that the decree of the High Court was confirmed by the Privy Council. The rights of the parties were thereby finally determined to be those declared by the High Court.

The appellant before us was appointed receiver in E. P. No. 82 of 1934 at the instance of a creditor of the first defendant. It would seem that the first defendant became heavily indebted and his rights under the decree had not only been mortgaged by him but had also been attached by creditors who had obtained decrees against him. It was on the application of one of such decree-holders, namely, the decree-holder in O. S. No. 126 of 1933 on the file of the District Munsiff's Court, Tanjore, that the appellant was appointed receiver to realise the estate and assets of the first defendant by an order made in E. P. No. 82 of 1934. In E. P. No. 48 of 1938 the order on which is now under appeal before us the receiver is seeking to enforce a security bond executed by the first respondent for enabling the respondents belonging to the Mangalavilas group to draw out from Court the share of the monies decreed to them by the Sub-Court, Tanjore, in the first instance. He claims recovery of Rs. 2,48,090-3-7 which according to him represents the amount to which the first defendant became entitled by way of restitution from defendants 5, 8 to 11, 25, 26, 27, 28 and 29. The appeal against the order rejecting this petition is C. M. A. No. 161 of 1940. E. P. No. 50 of 1938 is another petition by the same receiver seeking to enforce another security bond executed by the first respondent therein for the same purpose as that for which the security bond in E. P. No. 48 of 1938 had been executed. The appeal against the order dismissing this execution petition is C. M. A. No. 162 of 1940.

Before proceeding further it is necessary to mention one other fact in order to appreciate the contentions raised in these appeals. On an application made on 7th July, 1930, by the surety S. A. Narayana Iyengar who is the first respondent in E. P. No. 48 of 1938, the District Court, West Tanjore, passed an order on 13th December, 1930, cancelling the security bond executed by him. A similar order of cancellation was passed in favour of the surety in E. P. No. 50 of 1938 on 12th April, 1931. It is to be observed that these orders were passed long before the institution of O. S. No. 126 of 1933 on the file of the District Munsiff's Court, Tanjore. It was at the instance of the decree-holder in this suit and in execution of the decree passed therein that the appellant was appointed receiver. When the District Court, West Tanjore, passed its orders cancelling the security bonds aforesaid, it presumably followed the decision of this Court in C. M. A. No. 263 of 1926 where it was held that the bonds enured only to the benefit of the party on whose application the receiver appointed in the interpleader suit was continued during the pendency of the appeals therefrom and permission was granted to the successful claimants to withdraw the money from the Court. The judgment in this Civil Miscellaneous Appeal was pronounced on 24th April, 1928. On 29th March, 1933, however a different Bench of this Court held in C. M. A. No. 127 of 1933 that the earlier decision was erroneous and declared that the security bonds enured to the benefit of all persons who might be affected by the subsequent decisions in the

appeals then pending, though the application for the continuation of the receiver was made at the instance of one alone of the appellants. This difference of opinion was finally resolved by a Full Bench on 27th November, 1936 and it was held that the decision of the learned Judges in C. M. A. No. 127 of 1933 laid down the correct law on the point. It thus turns out that the cancellation orders were made on what has since been declared to be an erroneous view of the effect of security bonds. But unfortunately the orders themselves were allowed to become final without being challenged by appeals or otherwise. If these orders stand and are not to be treated as nullities, the appellant is faced with an insuperable obstacle inasmuch as the very bonds that are sought to be enforced had been cancelled and declared to be inoperative. This was exactly the contention raised by the respondent in the Court below. The learned District Judge went into the matter and held that the orders of cancellation were valid and accordingly dismissed both the petitions, E. P. No. 48 and E. P. No. 50 of 1938. The learned advocate for the appellant has advanced the same contention before us and has rested it upon two grounds, (1) that the orders of cancellation were passed without notice to all the parties interested and therefore they are void, and (2) that the Court which passed the orders had no jurisdiction whatever to pass them.

The application for cancellation of the security bond executed by Kolandavelu Pillai, the first respondent in C. M. A. No. 162 of 1940 was filed on 9th March, 1931, in the District Court of West Tanjore, and the order of cancellation was made on 12th April, 1931, as we have already mentioned. To this application the Mangalavilas group alone were made respondents but not the first defendant or his legal representatives. To the application made by the first respondent in C. M. A. No. 161 of 1940 for cancellation of the security bond executed by him, both the legal representatives of the first respondent and the Mangalavilas group were made respondents. In neither of the applications, however, were the attaching decree-holders made parties and no notice appears to have gone to them. When the execution petitions, E. P. Nos. 48 and 50 of 1938 were filed in the Court below the attention of the appellant was drawn to the fact that the security bonds had been cancelled and he was asked to explain how the petitions lay in the face of these orders. The appellants' explanation was that "the attaching decree-holders of the first defendant's restitution right whom this petitioner represents had no notice of the application to cancel the security bond and hence the said cancellation could not affect their rights to enforce the security. It is submitted that this petitioner is therefore entitled to enforce the security bond." In this explanation there is no reference whatever to the objection taken before us, *viz.*, the absence of notice to the first respondent or his legal representatives. Further it is clear even on the assumption that the attaching decree-holders were entitled to notice on the application for cancellation, the decree-holder at whose instance the appellant was appointed receiver was not one of them since, as already mentioned, his suit and decree were of a much later date. He cannot, much less can the appellant, claim that the orders in question are bad because of want of notice to either. It is doubtful whether the sureties were bound to give notice of their applications to other attaching decree-holders as their attachments gave them no interest in the property and the holder of the decree attached, namely, the first defendant who was entitled to restitution would fully represent their interests also. It is however unnecessary to pursue the matter further as we are satisfied that this ground was not urged in the Court below. We may observe that there is no reference to it in the judgment of the learned District Judge and what is more remarkable, no ground of appeal has been taken covering the point. We are not prepared to allow this point to be raised for the first time in this Court.

The second ground taken by the appellant appears to be equally without substance. What is urged is that the sureties had no *locus standi* to file applications for the cancellation of their bonds and the Court had no jurisdiction to entertain the applications or pass orders thereon. In this connection reliance is placed on the language employed in section 145 of the Code of Civil Procedure, which enacts

as follows :

"Where any person has become liable as surety—(a) for the performance of any decree or any part thereof, or (b) for the restitution of any property taken in execution of a decree, or (c) for the payment of any money, or for the fulfilment of any condition imposed on any person, under an order of the Court in any suit or in any proceeding consequent thereon, the decree or order may be executed against him, to the extent to which he has rendered himself personally liable, in the manner herein provided for the execution of decrees, and such person shall, for the purposes of appeal, be deemed a party within the meaning of section 47 :

Provided that such notice as the Court in each case thinks sufficient has been given to the surety."

It is contended that the surety, if he is a third party, cannot invoke the aid of the executing Court for any purpose whatsoever unless and until the party entitled to enforce the security bond initiates proceedings against him for enforcing it ; and stress is laid on the words "and such person shall, for the purposes of appeal, be deemed a party within the meaning of section 47." It may be conceded that by the mere execution of a security bond in favour of a party to the suit, a stranger does not entitle himself to the privileges of a party, nor is he bound by those restrictions which bind the latter. The object of the section appears to be two-fold : It provides a summary remedy by way of an application available to the party entitled to enforce the bond and at the same time confers on the surety proceeded against, a right of appeal as if he were a party within the meaning of section 47, Civil Procedure Code. The ordinary remedy by suit is left untouched by the section and either party may, if he so chooses, avail himself of it. The question that we are here called upon to decide is of a different character altogether and it is whether the surety is entitled to apply to the Court in whose favour the bond was executed not for the purpose of impugning its validity but for the purpose of construing it and determining its scope and deciding whether in the events which have happened the bond had spent itself and become for that reason unenforceable. It can scarcely be disputed that the Court below had jurisdiction to decide the question independently of the provisions of section 145 of the Civil Procedure Code. In *Raj Raghubar Singh* v. *Jai Indra Bahadur Singh*[1], the widow of a deceased taluqdar obtained a decree for possession of the taluka against his brother who had taken possession of it on his death. When she applied for execution of the decree an order was made under section 545, Civil Procedure Code, 1882, giving her possession on her furnishing security to restore the property with mesne profits to the extent of one lakh of rupees in case the decree should be reversed by the Appellate Court. The appeal failed. But on a further appeal to the Privy Council by the son of the original defendant the decree of the trial Court was reversed and the widow's suit was dismissed. Thereafter the successful party, namely, the brother's son of the late taluqdar applied to the executing Court under sections 47 and 144, Civil Procedure Code, for the fixation of mesne profits and damages. To this application both the widow and the sureties were made parties. The sureties raised two contentions, namely, that their liability ended with the decree of the appellate Court and secondly, that the liability, if any, cannot be determined and enforced in execution proceedings. Their Lordships of the Privy Council held that section 145 was not applicable to the case, because the sureties had not made themselves personally liable under their bonds. As regards sections 47 and 144 the opinion was expressed that these sections apply only to parties or representatives of the original parties and not to the sureties who were third parties. The contention was advanced that the only way in which the security bond could be enforced was by a separate suit to enforce the charge and not by an application. Their Lordships pointed out that where the sureties bind themselves by a security bond to the Court which is not a juridical person, it cannot be sued and that the only mode of enforcing it was by the Court making an order in the suit upon an application to which the sureties are parties, that the property charged be sold unless before a day named the sureties find the money. Their Lordships rejected the objection to the jurisdiction of the Court in emphatic terms observing,

"It is idle to talk of the proceedings as if they had been taken before a Court which had no jurisdiction."

1. (1919) 38 M.L.J. 302 : L.R. 46 I.A. 228 : I.L.R. 42 All. 158 (P.C.).

This case lays down the principle that the Court has an inherent power to decide questions arising between sureties and parties to the suit claiming the benefit of their bonds. In *Ayyaswami Ayyar* v. *Sivakki Ammal*[1] a Bench of this Court (Venkatasubba Rao and Reilly, JJ.) held that even in cases where section 145 of the Civil Procedure Code is inapplicable by reason of the fact that the sureties had not made themselves personally liable, the Courts possess a general power in regard to executing orders made against sureties, and in such cases, having regard to the decision of the Privy Council in *Raj Raghubar Singh* v. *Jai Indra Bahadur Singh*[2], and the policy underlying section 145, the sureties have a remedy by way of appeal against any orders that may be passed against them. The learned advocate for the appellant, however, contends that *Ramanatham Pillai* v. *Doraiswami Ayyangar*[3] precludes us from holding that the surety has a right to apply to the executing Court to cancel the security bond. In this case a security bond had been executed by the judgment-debtor and a surety on his behalf to obtain the release of the former from arrest. The executants of the bond, namely, the surety and the judgment-debtor undertook a joint and several liability for the payment of the amount mentioned in the bond and in default it was stipulated the money should be recovered from the surety personally and the properties hypothecated under the security bond and from the other properties of the surety. The surety filed a suit for a declaration that the security bond was not binding on him as it had been executed owing to undue influence, fraud and coercion practised upon him. To the maintainability of the suit a preliminary objection was taken on the ground that it was barred by section 47 of the Code of Civil Procedure.

Both the Courts below took the view that the surety had alternative remedies, (1) in execution proceedings in the Court which passed the decree, and (2) by way of an independent suit. But inasmuch as he had a remedy in execution which he did not take, the Courts refused to pass a declaratory decree which was held to be a discretionary relief. When the matter came up to this Court in second appeal the main argument was that the surety cannot apply to the executing Court under section 47 of the Civil Procedure Code for cancellation of the security bond on the ground that it was obtained by fraud. The Court held that the words in section 145 "shall for the purposes of appeal be deemed to be a party"

> "only mean that if an order is made in execution against a surety, the surety may appeal against the order as if he were a party to the suit in which the decree or order sought to be executed was passed, and that the reference to section 47 does not in other respects import into section 145 the provision, contained in section 47, which bars a separate suit. If it were not for the provisions of section 145, the liability of the surety would have to be enforced by a separate suit, because it does not arise under the decree but subsequently and under a separate contract with the Court. The effect of the section is that the surety may be made a party to the execution proceedings against the principal debtor, and an order against the surety is in effect a decree upon his separate contract against him for the payment of money. The surety is not a party to the suit, or to the decree made therein, nor does he become a party to execution proceedings until application is made for an order against him. He is not a party to the suit within section 47 and section 145 only makes him a party for a limited purpose, namely, for appeal."

In this view the Court held that the surety had no right to apply under section 47 to have the security bond cancelled. It is to be observed that the surety in the above case was seeking to attack the bond executed by him on the ground of undue influence and fraud, thus raising questions alien to an enquiry by the Court executing a decree. Very different considerations arise where the surety does not dispute the validity of the bond when it was executed but only states that by reason of the events that subsequently happened it has become discharged. In our opinion a question of the latter kind properly falls within the jurisdiction of the Court in whose favour the bond had been executed. If, as was conceded, such a question can be gone into by the executing Court after the initiation of proceedings for enforcing the bond, we fail to understand why the surety should be denied the privilege of anticipating those proceedings beforehand by an application filed by himself. In our opinion, section 145 does not impose a bar to the surety invoking

1. (1932) 65 M.L.J. 407: I.L.R. 56 Mad. 909.
2. (1919) 38 M.L.J. 302: L.R. 46 I.A. 228: I.L.R. 42 All. 158 (P.C.).
3. (1919) 38 M.L.J. 65: I.L.R. 43 Mad. 325.

the aid of the Court independently of an application under section 145. We therefore concur in the orders passed by the learned District Judge and dismiss the appeals with costs.

K.S. —— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

The Public Prosecutor .. *Appellant**

v.

The Coimbatore National Bank, Ltd., Coimbatore represented by its Managing Director B. Nanjunda Gounder .. *Respondent (Accused).*

Companies Act (VII of 1913), section 87 (2)—Failure to report particulars of change in other directorships held by any of company's directors—Company liable even if it has no knowledge of change.

Where a statutory duty is cast upon a company to do something, it must take steps to see that it is aware of all the changes that it has to notify to the Registrar and if it fails to do so, then the company becomes liable for the default without proof of any negligence. Where a company fails to report particulars of any change in the directorships held by any of its directors within fourteen days of the change as required by section 87 (2) of the Companies Act, it is unnecessary for the prosecution to prove that anybody connected with the company had knowledge of the change as the words " knowingly and wilfully" in the section can only relate to a person and not to a company.

The Public Prosecutor v. *B.V.A. Lury and Company*, (1941) 2 M.L.J. 487, referred to.

Appeal under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid respondent (accused) by the Sub-Divisional Magistrate of Coimbatore in C. C. No. 229 of 1941 on his file.

Appellant in person.

N. Somasundaram for Respondent.

The Court delivered the following

JUDGMENT.—The Assistant Registrar of Joint Stock Companies, Coimbatore, preferred a complaint against the Coimbatore National Bank, Limited, of that town for not complying with a requirement of section 87 (2) of the Indian Companies Act that particulars of any change in the directorships held by any of its directors should be reported to the Registrar within fourteen days of the change. The Sub-Divisional Magistrate of Coimbatore who tried the case, found that a director by name Ponniah Goundar had ceased to be the director of another company and that this fact had not been reported. He nevertheless acquitted the Bank, saying that he was unable to understand how a company is to know of such a change unless the director concerned intimates the change to the company. He held that as there was no evidence to show that the company was aware of the change, the company was not guilty of the offence with which it was charged. The Crown has appealed.

I pointed out in *The Public Prosecutor* v. *B.V.A. Lury and Company*[1] in connection with the interpretation of section 32 (5) of the Act, that one cannot impute intention and knowledge to an entity such as a company, that it is only a human being who can be said to have knowledge and intention, and that on a grammatical construction of section 32 (5) this knowledge, wilful intention has only to be proved where the charge is against an officer of the company, and that the company is liable for failing to comply with the requirements of the section even though none of its officers may be. Section 87 (4) says that if default is made in complying with sub-section (1) or sub-section (2) of this section (section 87), the company and every officer of the company who is knowingly and wilfully in default shall be liable to a fine of fifty rupees. "Who" can refer only to an officer of the company and not to the company ; and as I pointed out in *The Public Prosecutor* v. *B. V. A. Lury and Company*[1] " knowingly and wilfully " can only relate to a person and not to a company. So it is unnecessary for the prosecution to prove that anybody connected with the company had knowledge of the change.

Mr. Somasundaram seeks to make a distinction between facts which are available from the records of the company and facts which are not. For example,

* Crl. A. No. 688 of 1941. 26th November, 1941.

1. (1941) 2 M.L.J. 487.

where certain annual returns have to be submitted to the Registrar and there is some error in those returns, such an error may be and generally is clear from the records of the company. On the other hand, if we assume that Ponniah Goundar did not officially inform the accused company that he had resigned from one of his directorships, the company would not have been in a position to send the information to the Registrar. A clear distinction between the two sets of cases can no doubt be made ; but section 87 does not make that distinction. Sub-section (2) of section 87 says :

"The company shall within the periods respectively mentioned in this sub-section send to the Registrar a return in the prescribed form . . . . and a notification in the prescribed form of any change among its directors, managers, or managing agents or in any of the particulars contained in the register."

In the following paragraph the periods are laid down, and it is stated that the period within which such notification of a change is to be sent shall be fourteen days from the happening thereof. It is argued from the wording of the first paragraph in sub-section (2) that all that the company is expected to do is to notify a change in the register. The section however says that the company has to notify a change in any of the particulars contained in the register ; and the particular in question is that of other directorships held by the directors. If Mr. Somasundaram's contention were correct, then there would be a premium upon negligence by companies. Even though a notice had been sent to the company of a change in directorships or in other particulars, the company would be free of any penalty as long as it did not make a change in the register ; so that it would obviously be to the great advantage of the company if it did not take the trouble to keep its registers up to date. Where a statutory duty is cast upon a company to do something, it must take steps to see that it is aware of all the changes that it has to notify to the Registrar, and if it fails to do so, then the company becomes liable for the default. The scheme of penalties in the Act makes the company liable for every default without proof of negligence. If it were otherwise, the enforcement of the provisions of the Act would be impossible.

The acquittal is therefore set aside and the company convicted of the offence with which it was charged and sentenced to pay a fine of Rs. 25.

K.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Kuppala Krishtappa .. *Petitioner** (*Counter-Petitioner*)

v.

Premaleelamani, minor by mother Subbamma .. *Respondent* (*Petitioner*).

Criminal Procedure Code (V of 1898), section 488—Minor child in custody of mother—Right to custody denied by father—Maintenance for minor—Whether can be refused by father.

A mother having the custody of a minor child is entitled to apply under section 488, Criminal Procedure Code, for maintenance being paid by the father of the child. It would be improper for the Court to refuse maintenance for the child merely because it was of opinion that the mother had no right to the custody of the child. If the father has in such a case a right to the custody of the child he can only institute proceedings for that purpose.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the order of the Joint Magistrate of Penukonda, dated 28th April, 1941 and passed in M. C. No. 3 of 1941.

A. Gopalacharlu for Petitioner.

J. V. Srinivasa Rao for Respondent.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—This petition arises out of an application by the wife of the petitioner for maintenance under section 488 of the Code of Criminal Procedure for their child, which is in the custody of the mother.

* Crl. R. C. No. 723 of 1941. 30th October, 1941.
(Crl. R. P. No. 678 of 1941).

The husband and wife separated because they did not get on well together and because the petitioner contemplated taking another wife—which he eventually did. The elders of the village met together and effected a compromise, by which the wife was to get land worth Rs. 400 for her maintenance and a house to live in. The compromise refers to the petitioner's undertaking to bring the child up and protect it to get it married. I think this language would be more appropriate to the retention of the child by the father rather than by the mother; but whether this is what the panchayatdars decided is not quite clear. The learned Magistrate seemed to think this reference quite consistent with the child's staying with its mother. Some time after the settlement was effected, the petitioner sent a notice to his wife telling her that she should return or he would not be responsible for its maintenance or for its marriage. She replied to the effect that she was under no obligation to return the child and that he must maintain it. Eventually, the present application was filed by the wife for an allowance of Rs. 15 monthly as maintenance for the child. The Magistrate ordered payment of Rs. 10 a month.

Two points have been raised by the learned advocate for the petitioner. One is with regard to the custody of the child and his right to refuse maintenance unless the child is returned to his care, and the second is with regard to the quantum of maintenance. Whatever may be the correct construction of the settlement deed, it seems to me clear that as long as the child is with the mother, the mother must be given sufficient to maintain the child. If the father has a right to the custody of the child, he can at any time institute proceedings for this purpose. An adult can be coerced into coming into proper custody by refusing maintenance; but a child has no such choice; it must remain with whomsoever takes it. So it would be improper for the Court to refuse maintenance for the child merely because it was of opinion that the petitioner had no right to the custody of the child.

It seems to me that the rate of maintenance awarded by the learned Magistrate is rather high. Evidence has been adduced in which it is said that the petitioner is doing some money-lending business; but the Magistrate has not said that he accepts that evidence. Without discussing the proper rate of maintenance he says:

> "From the evidence it is apparent that the counter-petitioner is not a poor man. He owns two acres of wet land and six acres of dry land. I therefore order that he pay Rs. 10."

If that land is the only property of the petitioner he clearly cannot afford to give his child Rs. 10 a month. Those who arranged the compromise between the husband and wife thought that land worth Rs. 400 would yield a sufficient income for the maintenance of the wife. That land would not yield more than Rs. 30 or Rs. 40 a year. To award Rs. 10 a month for the child would therefore be grossly excessive. On the other hand, it is equally clear that the mother, from such a small allowance, would have nothing to spare for the child. I reduce the rate of maintenance awarded from Rs. 10 a month to Rs. 5 a month.

B.V.V. *Order modified.*

[SPECIAL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE LAKSHMANA RAO AND MR. JUSTICE KRISHNASWAMI AYYANGAR.

In the matter of a Pleader.*

Legal Practitioners Act (XVIII of 1879), section 15—Dismissal by Subordinate Court of complaint of professional misconduct against a pleader—No power to award costs—High Court taking up the matter under section 15 of the Legal Practitioners Act—Power to order payment of costs.

Where a Subordinate Court dismisses a petition against a pleader charging him with professional misconduct it has no power to award costs. But when the matter is taken up by the High Court under section 15 of the Legal Practitioners Act, the High Court can, if it deems just—as for instance where the complaint is found to be vexatious,—itself pass an order for the payment of costs.

The Advocate-General (*Sir A. Krishnaswami Aiyar*) for the Crown.

K. Umamaheswaram for the Pleader.

B. V. Ramanarasu for the Complainant.

---

* Referred Case No. 28 of 1942. 17th December, 1942.

The Order of the Court was delivered by

The Chief Justice.—This case raises the question whether the Court has power to award costs in a petition against a pleader charging him with professional misconduct. The charge was investigated by the District Judge of Nellore, who held that the petitioner's allegations had no foundation and consequently dismissed the petition. He ordered the petitioner to pay the respondent his costs, and he fixed the pleader's fee at Rs. 50. The case has been brought before this Court under section 15 of the Legal Practitioners Act. We consider that the District Judge was justified in dismissing the petition, but that he had no power to award costs. At the same time we are of the opinion that an order for costs can be passed by this Court.

Section 14 of the Legal Practitioners Act states the procedure to be followed when a charge of professional misconduct is brought in a Subordinate Court. If the presiding officer finds the charge established and considers that the practitioner should be suspended or dismissed in consequence he must record his finding and grounds thereof and present a report to the High Court. The High Court may then acquit, suspend or dismiss the practitioner. The presiding officer of the Subordinate Court has no power to pass an order of suspension or dismissal himself. He may acquit but if he considers that there is foundation for the charge he must submit his finding to the High Court for its orders. Section 15 says that the High Court in a case in which a practitioner has been acquitted otherwise than by an order of the High Court may call for the record and pass such order as it thinks fit. The power given to the High Court by this section is very wide.

Section 14 contains no provision empowering a presiding officer of a Subordinate Court to award costs and therefore he cannot make an order for costs, but this does not mean that the High Court cannot. In a case which went to the Privy Council from the Allahabad High Court an order for costs made by that Court in a case which arose under section 14 of the Act was upheld. The case is *Baboo Asharfi Lal* v. *The Judges of the Allahabad High Court*[1]. The judgment of the Allahabad High Court has not been published, but we have obtained a copy of it and we find that the Court suspended a pleader from practice for a period of four years and directed that he should pay the costs of the Crown in the High Court, the costs being fixed at Rs. 1,100. The pleader appealed to the Privy Council and their Lordships considered that as the pleader had been suspended from practice from the 23rd January, 1928, he would be adequately punished if the suspension ceased from the 22nd November, 1929. In directing the variation of the High Court's order in this respect the Judicial Committee expressly stated that there was to be no variation with regard to the order for costs. There is here the highest authority for the Court holding that a High Court has power, even in a case which comes before it under section 14, to award costs. If it has power in dealing with a case under section 14, it must also have power to make an order for costs in a case under section 15. The section says that it may pass what order it thinks fit.

This opinion accords with that expressed by a Full Bench of this Court in In re *an Advocate*[2]. In the Bar Councils Act the High Court is expressly authorised to pass such order as regards the payment of the costs of an inquiry against a practitioner under that Act and of the hearing in the High Court as it thinks fit. In In re *an Advocate*[2], the case was instituted under the Legal Practitioners Act, but while it was pending, the Bar Councils Act came into force and the inquiry was continued under that Act. The argument was that inasmuch as the case had been instituted under the Legal Practitioners Act and that Act contained no provision with regard to costs, costs could not be awarded. The Court refused to accept this proposition. It pointed out that the inquiry had in fact taken place under the Bar Councils Act and added that it was not prepared to concede that there was no jurisdiction to direct the payment of costs before that Act was passed.

---

1. (1929) 58 M.L.J. 483 (P.C.). 2. (1931) 61 M.L.J. 148: I.L.R. 54 Mad. 857 (F.B.).

In the course of the arguments our attention has been drawn to the decisions of this Court in *Sankaralinga Mudaliar* v. *Narayana Mudaliar*[1] and *Veerappa Naidu* v. *Avudayammal*[2], but those cases related to the power of the High Court to award costs in criminal cases. They have no bearing on the case now before us, but even if they had we should be bound to follow the decision of the Privy Council in *Baboo Asharfi Lal* v. *The Judges of the Allahabad High Court*[3].

As we have already indicated we have taken this case up under section 15 of the Legal Practitioners Act. This Court can, if it deems it just, itself pass an order for the payment of costs. The allegations which the complainant made were found to be without substance and the District Judge considered that some of them were vexatious. This is a proper case for the award of costs. We direct the complainant to pay the costs of the respondent in the District Court and we fix the pleader's fee at Rs. 50.

K.S. ——— *Order accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

M. C. T. M. Chidambaram Chettiar .. *Appellant** (*Respt.*)

v.

The Official Receiver, High Court, Madras .. *Respondent* (*Applicant*).

Practice—Winding up of company—Sale by Official Receiver—Advertisement in newspaper calling for tenders —Highest bid not accepted—Fresh tenders called—Propriety.

In pursuance of an order of Court to sell by tender a business which had been wound up the Official Receiver caused an advertisement to be published in the newspapers inviting tenders for the purchase of the business. The advertisement directed that the tenders should reach the Receiver on or before a particular date but it was not stated that the highest tender would be accepted and there was no reserve price fixed. The appellant was found to have submitted the highest offer. Subsequently however in an application made by the Official Receiver the Judge was informed that other persons were willing to raise their offers to figures above that offered by the appellant and thereupon he directed that a week's further time may be given for receipt of fresh offers or for increase of offers already made. He also directed that such offers should be made in sealed covers to be opened in Court. The said order having been objected to,

Held, that as the advertisement did not state that the highest tender would be accepted and as the sale had not taken place at the time when the Official Receiver took out his application for directions it was competent for the Court to pass the order that it did calling for fresh tenders.

Procedure for the holding of sales by Official Receivers indicated.

Appeal against the order of the Hon'ble Mr. Justice Chandrasekhara Ayyar, dated 13th November, 1942 and made in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Application No. 2285 of 1942 in O. P. No. 37 of 1942.

K. S. Rajagopala Aiyangar for Appellant.

Respondent not represented.

The Judgment of the Court was delivered by

The Chief Justice.—The facts of this case disclose a ground for a feeling of grievance by the appellant ; but the Court is not able to allow the appeal.

On the 13th August, 1942, Bell, J., ordered that the assets of the Madras Chemical Industries, Limited, which was in the process of being wound up under an order of this Court should be sold by tender. The intention was to sell the business as a going concern. In pursuance of this order the Official Receiver caused an advertisement to be published in the newspapers inviting tenders for the purchase of the business. The advertisement directed that the tenders should be sent to him by registered post so as to reach him on or before the 31st October, 1942. It was not stated that the highest tender would be accepted and there was no reserve

---

1. (1922) 43 M.L.J. 369 : I.L.R. 45 Mad. 913 (F. B.).
2. (1924) 48 M.L.J. 106 : I.L.R. 48 Mad. 262 (F.B.).
3. (1929) 58 M.L.J. 483 (P.C.).

* O. S. A. No. 67 of 1942. 1st December, 1942.

price fixed, but a person submitting a tender could reasonably expect it to be accepted if his bid proved to be the highest and the sum offered was adequate.

The Official Receiver opened the tenders on the 6th November and found that the appellant had submitted the highest offer. The appellant was prepared to pay a sum of Rs. 45,000 and discharge all the liabilities of the business. On the 10th November the Official Receiver took out a Judge's summons in which he asked for an order approving of the date fixed by him for the submission of the tenders and for directions as regards the offers submitted by the appellant and the Associated Agencies, Limited. The Associated Agencies had only bid Rs. 40,000. The matter came before Chandrasekhara Ayyar, J., on the 12th November when he approved of the date fixed for the submission of tenders. Having passed this order the learned Judge adjourned the case until the next day. When it was called the next day, the Official Receiver reported that the Associated Agencies, Limited, had expressed their willingness to raise their offer to Rs. 50,000. It was also reported to the Court that there was another offer. Thereupon the learned Judge directed that a week's further time should be given for the receipt of fresh offers or "for increase of offers already made." He also directed that the offers should be made in sealed covers addressed to the Official Receiver and that they should be opened in Court on the 23rd November. The appeal is from that order, and pending its hearing further proceedings have been stayed.

Mr. Braddell, on behalf of the appellant has contended that the present case falls within *Soundararajan* v. *Mohamed Ismail Saheb*[1]. The facts there were however very different. There the sale was by public auction and the advertisement stated that the highest bid would be accepted, subject to the confirmation of the Court. The respondent in that case bid Rs. 1,12,500 and the property was knocked down to him. When the sale was reported to Court for confirmation, the appellant said that he was prepared to offer Rs. 1,15,000. This was refused and the sale was confirmed. The Court, on appeal, held that the order of confirmation had been rightly passed and it was not open to a bidder at an auction to come to Court and increase his bid to the detriment of the highest bidder at the auction if that bid was acceptable.

As we have already indicated, in the present case the advertisement did not state that the highest tender would be accepted. When the matter came before the Court on the Judge's summons taken out by the Official Receiver, it was not a question of the confirmation of a sale as no sale had taken place. What the Official Receiver was in fact asking was whether he should accept the bid of Rs. 45,000 made by the appellant. The Associated Agencies, Limited, was entitled to make a further offer in the circumstances, but we consider that the course taken in this case for the sale of property by Court should not be followed in future cases. If the Court decides that the sale shall be by tender, the advertisement should state that the highest tender will be accepted subject to the confirmation of the Court and where feasible a reserve price should be fixed. In other words the sale should be on the same basis as a sale by public auction. In this case there was no stipulation that the highest tender would be accepted and we think that the Judge's order should stand.

The Official Receiver reports that three other tenders have been received as the result of the extension of time granted by Chandrasekhara Ayyar, J. We think that the appellant, if he wishes, should be permitted to put in a fresh tender; and he will be given a week's time from to-day to do this. The further tenders received will not be opened until after the expiration of the week and when they are opened they will be opened in Court on a date to be fixed by the learned Judge. No further tender will be allowed beyond those already in and the further tender of the appellant, should he desire to make one.

The appeal will be dismissed, but we make no order as to costs.

B.V.V. *Appeal dismissed.*

---

1. (1939) M.W.N. 1115.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KING.

Chinnaturai Muthiriyan *alias* Neelamega Muthiriyan .. *Appellants** (*Respondents-Appellants*)

v.

The Official Receiver, Trichinopoly .. *Respondent* (*Petitioner-Respondent*).

Provincial Insolvency Act (V of 1920), section 4—Application to set aside transfer—Time limit—Limitation Act (IX of 1908), Article 120—Starting point—Transfer of Property Act (IV of 1882), section 53.

Section 53 of the Transfer of Property Act is not exhaustive and an application can be made under section 4 of the Provincial Insolvency Act where the petitioner asserts that the transaction which he wishes to set aside is a sham and nominal one. And it is no impediment to the reception of the application by the Court under section 4 that the alienation in question was more than two years before the insolvency.

Where there are a number of creditors of the insolvent and the Official Receiver applies under section 4 of the Provincial Insolvency Act to have an alienation set aside the limitation under Article 120 of the Limitation Act may be computed from the date at which the last of the creditors became aware of the transaction.

Narasimham v. *Narayan Rao*, A.I.R. 1926 Mad. 66, considered.

Appeal against the order of the District Court of Trichinopoly dated 15th August, 1940 and made in C. M. A. No. 72 of 1939, preferred against the order of the Court of the District Munsiff of Trichinopoly, dated 11th September, 1939 and made in I. A. No. 1455 of 1938 in I. P. No. 14 of 1936.

K. V. Srinivasa Ayyar for Appellants.

S. Amudachari for Respondent.

The Court delivered the following

JUDGMENT.—This appeal arises out of an application by the Official Receiver of Trichinopoly under sections 4 and 5 of the Provincial Insolvency Act made in 1938 to set aside a settlement deed executed by the insolvent in favour of his minor sons in the year 1927. The deed has been set aside by the Courts below, the finding being that no title was ever intended to pass from the father to the sons.

It is argued in appeal that the decision of the Courts below is wrong because the interval between the execution of the settlement deed in 1927 and the adjudication of the father as an insolvent in 1936 was nine years and that section 53 permits only two years' interval ; and that even if section 53 is not exhaustive and section 4 applies, a suit by the Official Receiver or any of the creditors under section 53 of the Transfer of Property Act would have been dismissed as barred by limitation. It is impossible that in exercising jurisdiction under section 4 of the Provincial Insolvency Act, the Insolvency Act should ignore the principles of limitation, so that if no suit would lie under section 53 of the Transfer of Property Act, no application could be successful under section 4 of the Provincial Insolvency Act. The law is fairly clear that in matters of this kind, section 53 is not exhaustive and that applications can be made under section 4 where the petitioner asserts that the transaction which he wishes to set aside is a sham and nominal one. It is therefore no impediment to the reception of this application by the Court under section 4 that the alienation in question was more than two years before the insolvency. On the further question that the Insolvency Court ought not to entertain an application which if filed as a suit under section 53 of the Transfer of Property Act would be dismissed as barred by limitation, I am in agreement with the argument for the appellants. But, for the respondent a case decided by a Bench of this Court and reported in *Narasimham* v. *Narayan Rao*[1] has been quoted. The learned Judges who decided that case agreed that to a suit under section 53 of the Transfer of Property Act the article of the Limitation Act applicable was Article 120. They differed in their view of the time at which limitation under that article began to run, but both rejected the view that limitation began to run from the date of the alienation.

*A. A. A. O. No. 115 of 1941. 27th July, 1942.

1. A.I.R. 1926 Mad. 66.

Taking the view of Madhavan Nair, J., which is most favourable to the appellants in this case, limitation begins to run from the time when the creditor who filed the suit is aware of the fraudulent transaction which he seeks to obviate. The learned counsel for the appellants does not seriously deny that the principles of this decision must be applied to the present case. But he argues that a further finding of fact is necessary before it can be declared whether the application under section 4 was made more or less than six years after the creditors as a body had obtained knowledge of the transaction in question. It seems to me that it would be a sheer waste of time to call for any such finding. In a case of this kind where there are a number of creditors of the insolvent, the Official Receiver would certainly be entitled to take as the date from which limitation begins to run the date at which the last of these creditors became aware of the transaction and it is impossible that all the creditors of the insolvent were all aware of the transaction so long ago as 1932.

In the result the appeal must fail and is dismissed with costs. (Leave refused).

B.V.V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BYERS.

Piramanayaga Pandaram and others .. *Accused.**

Criminal Procedure Code (V of 1898), sections 349 (1) and 562—Relative scope.

There is a fundamental difference between the position of accused persons dealt with under section 349 and section 562 of the Code of Criminal Procedure. Under the former section, the accused are sent by the Court to a superior magistrate with an expression of the Court's opinion that they are guilty and it is then the duty of the superior magistrate to pass judgment upon them according to law. Under section 562 the accused persons come before the superior magistrate as convicted persons and he has no other option but to proceed under section 380 of the Code and pass sentence upon them in accordance with his powers. Section 349 (1) (*a*) has no application to the procedure under section 562 of the Code. It is open to a magistrate to sentence some of the accused and refer the remainder to the superior magistrate for the application of section 562 of the Code.

Case referred for the orders of the High Court under section 438 of the Code of Criminal Procedure by the Additional District Magistrate, Tinnevelly, in his proceedings, M. C. No. 8 of 1942, dated 24th September, 1942.

A. S. Sivakaminathan for the Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—This reference has been made by the Additional District Magistrate of Tinnevelly at the instance of the Sub-Divisional Magistrate of Shermadevi under the following circumstances. In Calendar Case 443 of 1942, forty-one persons were convicted by the Stationary Second Class Magistrate of Nanguneri of offences punishable under section 147, section 380 and various other sections of the Indian Penal Code. Of these, twenty-eight were sentenced to three months' rigorous imprisonment and the remaining thirteen were sent to the Sub-Divisional Magistrate under section 562 (1) of the Code of Criminal Procedure as they were adolescents whom the Sub-Magistrate considered should be dealt with accordingly. The Sub-Divisional Magistrate considered that it was not open to the Sub-Magistrate to sentence some of the accused to imprisonment and refer the remainder for the application of section 562 of the Code relying for his view on the decision in *Emperor v. Narayanaswami Naidu*[1]. The learned District Magistrate when making the reference expresses his disagreement with the Sub-Divisional Magistrate because in his view section 349 of the Code has no application to a case which falls exclusively within section 562 and the connected section 380 of the Code. In the case referred to it was held that all the accused should have been forwarded to the superior Magistrate in circumstances similar to these in accordance with the provisions in section 349 (1) (*a*) of the Code. There is a fundamental difference between the position of accused persons dealt with under section 349 and section 562 of the Code of Criminal Procedure. Under the former section they are sent by the

---

* Crl. R. C. No. 626 of 1942. 26th November, 1942.
(Case Referred No. 45 of 1942).

1. (1936) M.W.N. 1351.

Court to the superior Magistrate with an expression of the Court's opinion that they are guilty and it is then the duty of the superior Magistrate to pass judgment upon them according to law. Under section 562 the accused persons come before the superior Magistrate as convicted persons and he has no other option but to proceed under section 380 of the Code and pass sentences upon them in accordance with his powers. It has been held in the case of *Venkataswami Naicken* v. *Emperor*[1] that a superior Magistrate entertaining a reference under section 562 of the Code has no powers of acquittal, although he may make further inquiry in order to decide upon the proper order or sentence to be imposed. With all respect I consider that section 349 (1) (*a*) has no application to the procedure under section 562 of the Code. There is therefore no necessity for any interference with the order passed by the Stationary Sub-Magistrate under section 562 (1) and the reference is accordingly rejected and the Sub-Divisional Magistrate directed to dispose of the case in accordance with law. The order passed by the learned District Magistrate suspending the sentences of imprisonment upon the twenty-eight persons is vacated and they will be ordered to surrender and work out the remainder of their sentences.

K.S. *Reference rejected.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Yerabalu Chennabasappa .. *Appellant** (*Petitioner*)

v.

The Official Receiver of Bellary .. *Respondent* (*Counter-Petr.*).

*Provincial Insolvency Act (V of 1920), sections 37 and 68—Continuing of property in Official Receiver after annulment of adjudication—Sale by Official Receiver—Further directions of Court if necessary to confer power to sell—*Locus standi *of insolvent to apply for setting aside sale.*

On the failure of an insolvent to apply for discharge within the time allowed the adjudication was annulled but the property was ordered to continue in the Official Receiver. After a sale by the receiver, when the insolvent put in an application to set aside the sale on the ground of certain irregularities,

Held, (*i*) the principal purpose of continuing the property in the Official Receiver is that he might sell the property and distribute the proceeds and the power to do so must be implied from the order itself. It is not necessary that the Official Receiver or other person appointed should apply to the Insolvency Court for directions with regard to the sale.

Veerayya v. *Srinivasa Rao*, (1935) 69 M.L.J. 364 : I.L.R. 58 Mad. 908 (F.B.), explained.

(*ii*) The insolvent has no *locus standi* to apply inasmuch as he has nothing more than a mere hope that something might be left over if the estate was administered and that would not make him a person aggrieved within the meaning of section 68. Even after the annulment of adjudication he has no higher rights.

Hari Rao v. *Official Assignee, Madras*, (1926) 50 M.L.J. 358 : I.L.R. 49 Mad. 461 (F. B.), referred to.

Appeal against the order of the District Court of Bellary dated 5th September, 1941 and made in I. A. No. 56 of 1941 in I. P. No. 47 of 1935.

V. S. Narasimhachar for Appellant.

A. Bhujanga Rao and *D. R. Krishna Rao* for Respondent.

The Court delivered the following

JUDGMENT.—The appellant was adjudicated an insolvent, but because he did not apply for discharge within the time allowed, his adjudication was annulled. In annulling the adjudication the Insolvency Court passed an order continuing the property in the Official Receiver.

The primary duty of the Official Receiver being to realise the property and sell it and to distribute the proceeds, he advertised the property for sale ; and on the day before the sale took place the insolvent put in an application asking for two reliefs ; one to stay the sale, and the other to scale down the debt. The application, as far as the prayer for stay was concerned, was dismissed ; but the application to scale down was adjourned. The sale took place on the advertised date ;

---

1. (1942) M.W.N. 123.

* A. A. O. No. 18 of 1942. 24th November, 1942.

and ten days later, on 14th March, 1941, the insolvent put in another application to stay all further sale proceedings and to set aside the sale on account of certain irregularities. As that application, too, was dismissed, the insolvent carried the matter in appeal to the District Judge, who dismissed his application on several grounds. One was that the insolvent had no *locus standi*; because he was not an interested party. Another was that the persons who had acquired rights under the sale were not made parties, and thirdly, on the merits, the learned District Judge thought that the objections raised were frivolous.

One of the points raised by the appellant was that the Official Receiver had no power to sell; and for that purpose he relied on some observations in the judgment of King, J., in the Full Bench decision in *Veerayya* v. *Srinivasa Rao*[1]. The learned Judges were there considering the powers of a receiver or other person appointed to continue the administration of the property after the annulment, and they held that the receiver or other person appointed has only such powers as are necessarily implied by the vesting order, which are to carry out the directions of the Court, which direction should, as far as the realisation and distribution of the debtor's property are concerned, be in accordance with the provisions of the Insolvency Act. I do not read into these sentences any finding that the Official Receiver or other person appointed has to apply to the Insolvency Court for directions with regard to powers that are obviously intended to be conferred by the order vesting the property in the Official Receiver. The principal purpose of continuing the property in the Official Receiver is that he might sell the property and distribute the proceeds. That power must be implied from the order itself.

I agree with the learned District Judge that the appellant was not a person aggrieved, within the meaning of section 68 of the Provincial Insolvency Act. Coutts-Trotter, C.J., in *Hari Rao* v. *Official Assignee, Madras*[2], discussed certain English cases on the subject and pointed out that the insolvent has nothing more than a mere hope that something might be left over if the estate was administered, and that that would not make him a person aggrieved. Coutts-Trotter, C.J., approved of a dictum of James, L.J., to the effect that,

> "the mischief of allowing a bankrupt on the contingent chance of his ultimately acquiring title to some surplus which might never be realised, to interfere with and embarrass the administration of the estate, would be immeasurable."

It is argued that the insolvent has a higher right in the property after the adjudication has been annulled and that he has title in the property subject to such rights as the Official Receiver might have in administering the property. I am not prepared to concede that he has higher rights in the property after the adjudication has been annulled; but even if he had, the arguments adopted in *Hari Rao* v. *Official Assignee, Madras*[2], would apply equally strongly to the case of a person whose adjudication had been annulled, but whose property continued to vest in the Official Receiver. As King, J., has said in *Veerayya* v. *Srinivasa Rao*[1]:

> "It is obvious that the only reason for the annulment under that section (section 43) is the conduct of the insolvent himself, and from sub-section (2) of that section, that its primary object is to punish the insolvent by depriving him of any protection which he may hitherto have been enjoying under the insolvency law."

Even after annulment the insolvent can have no greater expectation of realising any surplus in the assets than he would have had if he continued to remain an insolvent.

As to the point made by the learned District Judge that the petition to set aside the sale was not maintainable on the ground that the auction purchasers had not been made parties, it has been pointed out that all that is required under Order 21, rule 92, Civil Procedure Code, is that notice should go to all persons interested, and that notice did go in this case. It has not however been proved that notice did go, although an extract from the B diary indicates that the Official Receiver was instructed to tell the persons interested of this application. Whether he did so or not we have no information.

---

1. (1935) 69 M.L.J. 364: I.L.R. 58 Mad. 908 (F.B.).

2. (1926) 50 M.L.J. 358: I.L.R. 49 Mad. 461 (F.B.).

I agree with the learned advocate for the appellant that if this matter had to be decided on the merits, then the District Judge was bound to hear all the evidence that the appellant chose to adduce and that he could not decide the matter on the evidence of two witnesses selected by him on the ground that as any other witnesses examined would have said the same thing there was no object in examining them.

Another ground on which the learned District Judge thought that the appellant had no *locus standi* was that he had alienated the property in question. Although in an application by the Official Receiver under sections 53 and 54 of the Insolvency Act an alienation may be declared void as against the Official Receiver, it is still binding on the parties to the transaction, namely, the insolvent and the alienee ; and that therefore the person interested in the surplus of the property was not the insolvent but the alienee. In view of what has been held in earlier paragraphs, it is not necessary to consider this question, although it has been pressed here by the learned advocate for the respondent.

The appeal is dismissed with costs. The Official Receiver may, if he wishes, recover his costs from the property of the appellant vested in him.

K.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BYERS.

Sevugaperumal and others .. *Appellants* (Accused-Prisoners).*

Criminal Procedure Code (V of 1898), section 423 (1)—Appeal—Records of trial Court destroyed by fire and copies not available—Proper procedure is to order a re-trial.

The provisions of section 423 (1) of the Criminal Procedure Code are mandatory and it is obligatory for the appellate Court to obtain and examine the records at the time of hearing. Where the records of the case are destroyed by fire in the trial Court and no copies of the records are available the only course possible is to order a re-trial.

Appeal against the order of the Assistant Sessions Judge of the Court of Session of the Ramnad Division at Devakottai in C. C. No. 30 of 1942 dated 22nd June, 1942.

N. Somasundaram for Appellants.

A. S. Sivakaminathan for the Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court delivered the following

JUDGMENT.—The six appellants have been convicted of house-breaking by night and dacoity, punishable under sections 457, 395 and 397 of the Indian Penal Code, and sentenced to various terms of imprisonment by the Assistant Sessions Judge of Ramnad at Devakottai. They filed a regular appeal on the 6th August, 1942, through their learned counsel and in due course the records were called for from the lower Court. On the 17th August, the Court of the Assistant Sessions Judge at Devakottai was destroyed by fire and it has been reported that the records of this case were destroyed in that fire. No copies of the records are available and since the provisions of section 423 (1) of the Criminal Procedure Code are mandatory, Mr. Somasundaram suggests that the only course possible is to order a re-trial. His contention is that it is obligatory for the Court to obtain and examine the record at the time of hearing and in support of his suggestion he relies on the decision in *Queen-Empress* v. *Khimat Singh*[1]. The learned Public Prosecutor concedes that no other course is possible under the circumstances and in the result the convictions are set aside and the case is ordered to be re-tried by the Sessions Judge of Ramnad. Mr. Somasundaram has informed the Court that he has copies of the committal proceedings and these may prove to be of great help if these records also have perished.

K.S. ——— *Re-trial ordered.*

---

*Crl. A. No. 409 of 1942. 5th November, 1942.

1. (1889) A.W.N. 54.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BYERS.

Nagulatiah .. *Petitioner** (*Accused*).

Motor Vehicles Act (IV of 1939), sections 42 (1) and 123 (1)—Scope—Driver of bus carrying passengers in excess of the number specified in permit—Not liable if the bus carries a conductor.

The responsibility for exceeding the sanctioned carrying capacity of a public bus exclusively belongs to the conductor when one is carried. Under rule 219 of the Rules under the Motor Vehicles Act, this duty devolves on the driver only in the absence of a conductor.

Petition under sections 435 and 439 of the Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the Sub-Divisional First Class Magistrate of Dhone, dated 10th June, 1942 and made in Crl. A. No. 29 of 1942 preferred against the judgment of the Court of the Stationary Sub-Magistrate of Kurnool in C. C. No. 1358 of 1941.

P. C. Parthasarathy for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—The petitioner is the driver of a motor bus who has been convicted under section 123 (1) read with section 42 (1) of the Motor Vehicles Act for driving his bus with nine and a half passengers in excess of the number specified in the permit for the vehicle. He was sentenced to pay a fine of Rs. 75 by the Stationary Sub-Magistrate and in appeal the conviction was confirmed but the fine was reduced to Rs. 25. The only point taken in revision is that the conviction is illegal because section 123 (1) has no application and because it is no part of the driver's duty to prevent the vehicle being used in excess of its specified seating capacity. This duty, it is contended, has been cast on the conductor under rule 218 of the Madras Motor Vehicles Rules framed in exercise of the powers conferred by section 67 of the Motor Vehicles Act. It is admitted that there was a conductor on the vehicle at the time but the learned Public Prosecutor supports the conviction on the ground that section 123 (1) of the Act is sufficiently wide to cover the case of a driver who drives the vehicle in an overloaded state, this being in contravention of sub-section (1) of section 42 of the Act. The relevant portion of section 42 (1) is in the following words :

> " No owner of a transport vehicle shall use or permit the use of the vehicle in any public place, save in accordance with the conditions of a permit granted or counter-signed by a Regional or Provincial Transport Authority authorising the use of the vehicle in that place in the manner in which the vehicle is being used."

The conditions contemplated by section 42 and the succeeding sections relate to their use as passenger vehicles, goods vehicles, or as vehicles for the carriage of both passengers and goods, and the areas within which and the periods for which permits are to be valid. In addition to these primary conditions governing the use of a vehicle, there are also the general conditions provided by section 59 which are common to all permits. Section 68 of the Act provides also for the issue of rules and it is in these rules that all the detailed regulations regarding the operation of transport vehicles, including the duties of drivers and conductors, are to be found. The duties of drivers and conductors are contained in rules 216, 217, 218 and 219. Rule 218 (*i*) is in these words :

> " The conductor of a public service vehicle shall not allow any person to be carried in any public service vehicle in excess of the seating capacity specified in the permit of the vehicle."

Under rule 219 this duty devolves on the driver in the absence of a conductor.

Section 68 (1), under which these rules are framed, empowers the Provincial Government to make rules " for the purpose of carrying into effect the provisions of this chapter." Section 68 (2) refers to the several subjects on which rules may be made without prejudice to the generality of the powers under section 68 (1) and these include " the determination of the number of passengers a stage or contract carriage is adapted to carry and the number which may be carried."

---

* Cl. R. C. No. 568 of 1942. 1st December, 1942.
(Cl. R. P. No. 541 of 1942).

It is clear, therefore, that the sanctioned carrying capacity of a vehicle is determined under the rules and that the responsibility of exceeding it exclusively belongs to the conductor when one is carried.

What is prohibited by section 42 (1) of the Act is the use of a transport vehicle except in accordance with the conditions of its permit and under section 123 (1) the driver is liable to the penalty therein provided. The petitioner was admittedly driving the vehicle at the time and so the correctness of the conviction depends upon whether or not the number of passengers to be carried was a condition of the permit within the meaning of section 42.

The permit is in Form P S P under rule 159 (*i*) of the Rules. This contains the number of passengers' seats as well as the maximum laden weight but it is nowhere expressed as a condition of the use of the vehicle that its seating capacity shall not be exceeded. Nor is any such condition included in the general rules contained in section 59, although there are conditions regarding maximum and minimum fares and freights. Therefore, although the permit in Form P S P includes details of the number of passengers' seats in the vehicle, overloading is not a breach of the conditions of the permit punishable under section 123 (*i*) read with section 42 (*i*) of the Act, but is a breach of rule 218 punishable under section 112 of the Act. If an express prohibition on overloading were inserted as a special condition in paragraph 15 of the permit P S P, I consider that rule 218 would protect the driver from all responsibility in the matter. It is plain that the driver cannot be held liable for the non-observance of a rule or condition in respect of which he has been exempted from all responsibility by a statutory rule. The conviction is therefore set aside and the fine, if paid, ordered to be refunded.

K.S. *Conviction set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Ordinary Original Civil Jurisdiction.)

PRESENT :—MR. JUSTICE CHANDRASEKHARA AYYAR.

Ghulam Asadullah Khan and others .. *Plaintiffs**

v.

Mohamed Ali Khan and others .. *Defendants.*

Quia timet *action—Co-heirs of Mahomedan testator—Apportionment of properties and mortgage debt—Agreement to discharge portion of debt and keep indemnified—Default—Suit to enforce agreement to pay—Enforceability—Form of decree to be passed.*

The plaintiffs were some of the sons and the daughters of one *M* deceased, and the defendants were his sons and his widow. The first plaintiff who was appointed sole executor of the will of *M* applied for and obtained probate. Subsequently he mortgaged a part of his estate with E. Society for a certain amount and paid off some debts due by the estate. The mortgage contained a power of sale under section 69 of the Transfer of Property Act. Later on all the heirs entered into an agreement about the distribution of the estate and the discharge of their liabilities. Under this agreement all the plaintiffs except the executor-plaintiff were to take certain houses and were liable to pay to the E. Society a certain amount being their share of the mortgage debts, while the defendants were to take another house and were liable for the remaining share of the mortgage debt. The agreement was followed by two deeds by which the properties and liabilities were apportioned in accordance with the agreement. It was provided therein that the parties should pay the several liabilities within three months from the date of the deed or to make within the same period the necessary arrangements to release the properties of the other branch from the liabilities. It further provided as follows: "The heirs further jointly and severally covenant with the executor and each other that they, the heirs and each of them will at all times hereafter keep the executor and estates of the remaining heirs indemnified from and against all claims and demands whatsoever for or in respect of any liability allotted to each branch and undertaken by them to pay and discharge. Each branch further undertakes not to alienate, incumber or create a charge over the properties conveyed to it till all the liabilities imposed upon and undertaken by it are cleared, except for discharging the liabilities imposed upon each or to pay their advocates' fee." The E. Society refused to recognise the arrangement come to among the heirs and insisted on their right to bring all the properties to sale. The plaintiffs paid to the Society a major portion of their share of the debt, but the defendants paid nothing and the Society thereupon brought the properties to sale. The plaintiffs thereafter sued the defendants to make good their liability and the contract of indemnity. The defendants contended that as the Society had not taken effective steps to have the properties sold and as the plaintiffs had not suffered any damage the suit was premature and unsustainable.

---

* C. S. No. 108 of 1941. 16th July, 1942.

Held, that the suit which was in the nature of a *quia timet* action was maintainable under the circumstances of the case.

Decree passed directing the defendants to pay up within three months their share of the liability to the E. Society or enter into a separate arrangement with the Society for such payment and that in default the defendants should bring into Court the amount due by them under the mortgage so that the same may be paid over to the mortgagees, and that on such payment the defendants were entitled to apply for their property being released from liability for the debt. *Wooldridge* v. *Norris*, (1868) L.R. 6 Eq. 410 and *Lacey* v. *Hill*, (1874) L.R. 18 Eq. 182, relied on.

K. Narasimha Ayyar for *C. R. Krishna Rao* for Plaintiffs.

A. Ramaswami Aiyar for Defendants.

The Court delivered the following

JUDGMENT.—This is a *quia timet* action by eight plaintiffs against three defendants, all of whom are the heirs and legal representatives of a gentleman called Madhi Hussain Khan, who died on 26th July, 1932, leaving a will under which he appointed the first plaintiff as the sole executor. The first four plaintiffs are the sons and plaintiffs 5 to 8 are the daughters of Madhi Hussain Khan. Defendants 1 and 2 are his sons and the 3rd defendant is his widow. The first plaintiff obtained probate of his father's will. On 10th July, 1933, he mortgaged a part of the estate, namely, houses bearing Nos. 50, 51, 51-A, 52 and 53, Peters Road, Royapettah, with the Egmore Benefit Society for a sum of Rs. 30,000 and paid off some debts due by the estate. This mortgage in favour of the Society contained a power of sale under section 69 of the Transfer of Property Act. Subsequently all the heirs entered into an agreement about the distribution of the estate and the discharge of their liabilities. Under this agreement plaintiffs 2 to 8 were to take houses Nos. 50, 51, 51-A and 53, Peters Road, Royapettah and were liable to the Egmore Benefit Society in a sum of Rs. 23,070 as representing their share of the amount due under the mortgage deed executed by the executor, while defendants 1 to 3 were to take house No. 52, Peters Road, Royapettah and were liable to the Society in a sum of Rs. 9,780 in respect of the same mortgage as representing their share.

This agreement was followed on 30th August, 1938, by two deeds, one of which Ex. P-2 was executed by the executor in favour of several heirs making the allotment of properties and distributing the liabilities as per the agreement, and the other is Ex. P-3, which is a deed of release and indemnity as between the several heirs *inter se* undertaking to pay and discharge the several liabilities imposed upon each within three months from the date of the deed or to make within the same period the necessary arrangements to release the properties of the other branch or branches from the liabilities they are subject to. This deed further provides as follows :

> "The heirs further jointly and severally covenant with the executor and each other that they, the heirs and each of them will at all times hereafter keep the executor and estates of the remaining heirs indemnified from and against all claims and demands whatsoever for or in respect of any liability allotted to each branch and hereby undertaken by them to pay and discharge. Each branch further undertakes not to alienate, incumber, or create a charge over the properties conveyed to it till all the liabilities imposed upon and undertaken by it are cleared, except for discharging the liabilities imposed upon each or to pay their advocate's fee."

The plaintiffs paid to the Egmore Benefit Society by selling House No. 50, Peters Road, Royapettah, a sum of Rs. 14,700 in April, 1939, and their assertion that they have paid every pie of interest due to the Society on their share of the liability up to this date has not only not been challenged but is proved beyond any doubt by the pass book Ex. P-26. The Society refused at first to recognise the arrangement come to among the heirs concerning the division of the mortgage liability and insisted on their right to bring all the properties to sale for the amount of principal and interest due after giving credit to the payment of Rs. 14,700 and to the sums paid by way of interest by the plaintiffs. This will be seen from Ex. P-9. The position then was this. Under the agreement the plaintiffs were due to pay to the Society only Rs. 8,500 for their share, while the defendants were liable to pay to the Society not only a sum of Rs. 9,780 but something more for interest which they had defaulted to pay. The Society advertised the properties for sale on 31st December, 1939, but the sale was stopped at the request of the plaintiffs for time. The plaintiffs wrote to the defendants Ex. P-12 on 28th November, 1939, pointing out that the

sale was the direct consequence of their non-payment of interest on their share of the liability and that if their properties were also brought to sale the defendants would be liable for any loss the plaintiffs might sustain. It is stated that for this letter there was no reply. On 14th March, 1940, the Society wrote to the plaintiffs' advocate that they had nothing whatever to do with the family arrangement between his clients and the other mortgagors; in other words, they wanted the whole amount remaining due to be paid to them. Thereupon the plaintiffs' advocate sent to the defendants the letter, Ex. P-14, on 13th November, 1940, calling on them to pay to the Society the balance of their share of the liability and informing them that in default, legal steps would be taken against them. Once more the Society brought houses Nos. 51 and 51-A which were allotted to the plaintiffs for sale on 22nd December, 1940, and the plaintiffs wrote to the Society requesting them to bring house No. 52 to sale first as the liability was primarily that of the defendants, who had committed default in the payment of interest as a result of which penal interest was running. Accordingly house No. 52 was brought to sale by the Society and was purchased by the Society for Rs. 8,100 in June, 1940, but the sale did not materialise and was not treated as a good one on objection raised by the defendants to the purchase by the mortgagees themselves. On 6th December, 1940, the plaintiffs wrote another letter to the defendants asking them to separate the two liabilities and to execute a separate mortgage in favour of the Society for their share of Rs. 9,870 *plus* interest due up till 30th November, 1940. This again elicited no reply. The Society took up a reasonable attitude in March, 1941, as will be seen from Ex. P-20, where they say that if the amount due to them was secured, they would have no objection to effect being given to the terms of the partition deed by allowing the two sets of heirs to execute separate mortgages in respect of the properties allotted to their respective shares. This letter is important as it shows that for Rs. 8,500 which was due by the plaintiffs in respect of their share of the liability houses Nos. 51 and 51-A were considered sufficient security, whereas for the remainder that was due by the defendants there was adequate security only for Rs. 7,700, out of which Rs. 1,700 represented the value of the additional security that was offered by them, namely, Nos. 25 and 26, Mosque Street. The Society wanted the mortgagors to pay the difference amount of Rs. 3,755 and odd, which was of course the liability of the defendants under the terms of the agreement. The defendants made no arrangement for payment of this amount. The proposal made by the Society could not therefore come into effect and once again a sale was advertised for 27th May, 1941, of houses Nos. 51, 51-A, 52 and 53, Peters Road, Royapettah.

It was in this posture of affairs that the present suit came to be filed on 12th May, 1941, calling upon the defendants to make good their liability and the contract of indemnity by bringing their share of the amount due under the mortgage and thus save the plaintiffs from the harm of their properties being brought to sale by the Society, even though those properties were considered by the Society as ample security for the plaintiffs' own share of the liability of Rs. 8,500. The defendants say in their written statement that the plaintiffs, who are themselves defaulting parties, cannot maintain the present suit, and that if they had paid to them the sums which they had to pay under the agreement of allotment, it would have enabled them to pay over the sums to the Society in reduction of interest due and also a portion of the principal, and that the plaintiffs must be held responsible for the inability of the defendants to discharge their share of the liability which they undertook to discharge under the agreement. The suit is the result of ill-feelings between the parties and as the Society had not taken any effective steps for bringing the properties to sale and as the plaintiffs have not suffered any damages, the action was premature and misconceived.

The only issue that has been framed in this case is whether the suit is maintainable. I take it that this was framed because of the plea raised by the defendants that as no damages have yet been suffered and as the plaintiffs have not been made to pay what the defendants should pay, there was no cause of action for the plain-

tiffs. This plea, however good in common law, is unsustainable in equity and this has been laid down in many English decisions. It is necessary to refer only to a few of them. *Wooldridge* v. *Norris*[1] is one of such cases where it was held that a surety, though he had not actually paid anything, was entitled to maintain a bill against the executors for payment of the debt and indemnity. In that case the bond was an actual bond for indemnity and the person to be indemnified was a surety on another bond. *Lacey* v. *Hill*[2] is another such case. Sir George Jessell, M. R., at page 191, says :

> " Whatever may be the case at law (as to which I say nothing, because it is not necessary), it is quite plain that in this Court any one having a right to be indemnified has a right to have a sufficient sum set apart for that indemnity. It is not very material to consider whether he is entitled to have that sum paid to him, or whether it must be paid direct over to the creditor. If the creditor is not a party, I believe that it has been decided that the party seeking indemnity may be entitled to have the money paid over to him."

The case of *Wolmirshausen* v. *Gullick*[3] was between two co-sureties and the question was whether one co-surety can compel the other to contribute towards the common liability even before he had paid his share of the liability and it was held by Wright, J., that he could. Reference may be made also to *Ascherson* v. *Tredegar Dry Dock and Wharf Co., Ltd.*[4] and In re *Richardson*: Ex parte *The Governors of St. Thomas Hospital*[5]. The argument that the jurisdiction to relieve the surety was limited to cases where the creditor refused to sue the debtor was negatived in the earlier of these two cases and it was laid down that the surety was entitled to come in equity to compel the principal debtor to pay what was due from him, to the intent that the surety might be relieved. The distinction between an action at common law and in equity is pointed out in the later case at page 709 where it is said that the common law view " first pay and then come to the Court under your agreement to indemnify" is not the view taken in the exercise of equitable jurisdiction.

The present action is therefore clearly maintainable. There is no doubt on the correspondence which has been referred to that the plaintiffs' properties are in danger of being brought to sale for the default of the defendants who would not pay their share of the liability and would not enter into a separate arrangement with the Society for making good the deficiency of Rs. 3,755. So far as the plaintiffs' share of the liability is concerned, it is only Rs. 8,500 and as pointed out already, the Society has accepted the position that the properties allotted to them are ample security for this amount.

The only questions that we have to consider are, what is the form of the decree to be made in the present case and what is the proper order as regards costs. Under the contract of indemnity Ex. P-3 the defendants undertook to discharge their liability within three months and to indemnify the plaintiffs against any claims or demands whatsoever for or in respect of any such liability. The three months have long ago expired and so far nothing has been done by them with the result that the properties of the plaintiffs have been brought to sale on more than one occasion which would not have happened if the amount still due on the mortgage was only what is due by the plaintiffs. They have furnished sufficient security for the same and which security the Society was prepared to accept as adequate. We must see that the plaintiffs are not damnified by any default or negligence of the defendants, but at the same time we have to take care against the possibility of the plaintiffs not paying their share of the amount and the Society proceeding against the defendants' property in consequence.

There will be a decree directing the defendants to pay up within three months from this date their share of the liability to the Egmore Benefit Society or enter into a separate arrangement with the Society for such payment within the same period and that in default of their doing so, they shall bring into Court a sum of Rs. 11,256-4-11 being the amount due by them under the mortgage up to and

1. (1868) L.R. 6 Eq. 410.
2. (1874) L.R. 18 Eq. 182.
3. (1893) 2 Ch. 514.
4. (1909) 2 Ch. 401.
5. (1911) 2 K.B. 705.

inclusive of the 30th June, 1942, so that the said amount together with any subsequent interest that the defendants may be called upon to pay under this decree for the subsequent period may be paid over to the Egmore Benefit Society. On such payment being made or on the defendants entering into a separate arrangement for such payment, the defendants will be at liberty to apply to this Court for a direction that the plaintiffs do, by payment of their share of the liability under the mortgage or otherwise, secure for the defendants a release of the Society's claims over the defendants' properties.

Though the defendants are to blame for the present situation, I cannot admit that the relief to which the plaintiffs are entitled is really anything like the sum of Rs. 11,000 and odd which the defendants have to pay to the Society for their share of the liability ultimately. No damages have yet been sustained and we are only making a provision in anticipation for any loss that may occur as a result of the defendants' default and breach of the contract of indemnity. Further, we have to take into account the fact that the plaintiffs who are liable under the arrangement to pay the defendants certain amounts did not do so and suits had to be filed against them for the purpose. In one of the decrees the plaintiffs have managed to obtain an order for payment by instalments. Even the Society would have been content if the defendants had paid up or furnished security for the difference of Rs. 3,755. Had this been done, there would have been no trouble at all. Having regard to all these facts and circumstances, I think the proper order as to costs should be that the plaintiffs will get taxed costs of this suit, the court-fee being limited to the minimum payable and advocate's fee being calculated on Rs. 5,000.

The first defendant will be discharged from his receivership without any obligation to file or pass accounts.

By consent the restraint on alienation will continue until further orders of this Court.

B.V.V. ——— *Suit decreed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

R. Narayana Reddiar .. *Appellant** (*Plaintiff*)

v.

Venkatesa Reddiar and others .. *Respondents* (*Defendants*).

Limitation Act (IX of 1908), section 19—Acknowledgment — Validity—Two mortgages—Insolvency of mortgagor—Sale of property by Official Receiver—Payment towards interest by purchaser's representative—Saving of limitation.

On 30th October, 1924, the first defendant executed a mortgage of immovable properties in favour of the plaintiff's father. On 26th November, 1927, the first defendant executed a second mortgage over some of the properties covered by the first mortgage in favour of another person. On 29th September, 1928, the mortgagor was adjudicated an insolvent. Some of the mortgaged properties had been sold before the adjudication and on 17th February, 1931, the Official Receiver sold the rest of the properties subject to the mortgages which had been created and the properties, were purchased by one *R*. *R* having died subsequently his representative the second defendant paid a certain sum on 15th November, 1936, towards the interest due on the mortgage created in favour of the plaintiff's father and the payment was duly acknowledged by an endorsement on the mortgage deed. It was common ground between the parties that the second defendant was a person who could make the payment and endorsement. On 11th November, 1940, the plaintiff filed a suit to enforce the mortgage and the Court passed a decree, but it excluded the properties covered by the second mortgage on the ground that the mortgagee's claim was time-barred regarding them. On appeal,

Held, that the payment and endorsement by the second defendant towards interest on 15th November, 1936, saved the full rights of the mortgagee and that the exclusion of the items covered by the second mortgage was erroneous.

Pavayi v. *Palanivelu*, (1940) 1 M.L.J. 766 : I.L.R. (1940) Mad. 872 (F.B.), considered.

Thayyanayaki Ammal v. *Sundarappa*, (1941) 2 M.L.J. 913 : I.L.R. (1942) Mad. 308, relied on.

---

*Appeal No. 346 of 1941. 21st October, 1942.

Appeal against the decree of the Court of the Subordinate Judge of Cuddalore in O. S. No. 48 of 1940.

S. Panchapagesa Sastri and *K. R. Krishnaswami Aiyar* for Appellant.

T. E. Ramabhadrachariar and *K. Ramanathan Chettiar* for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—On the 30th November, 1924, the first defendant executed a mortgage of immovable properties in favour of the plaintiff's father. On the 26th November, 1927, the first defendant created a second mortgage over some of the properties covered by the first mortgage. The second mortgage was in favour of one Krishnaswami Naicker, whose legal representatives are defendants 4 to 6. On the 29th September, 1928, the mortgagor was adjudicated an insolvent. Four of the mortgaged properties had been sold before the adjudication. On the 17th February, 1931, the Official Receiver sold the rest of the properties, subject, of course, to the mortgages which had been created. The properties were purchased by Ramaswami Reddiar, the elder brother of the second defendant. Ramaswami Reddiar is now dead and is represented by the second defendant. On the 15th November, 1936, the second defendant paid Rs. 50 towards the interest due on the mortgage created in favour of the plaintiff's father and the payment was duly acknowledged by an endorsement on the mortgage deed. It is common ground that the second defendant was a person who could make the payment and endorsement. See *Askaram Sowkar* v. *Venkataswami Naidu*[1].

On the 11th November, 1940, which was after the death of his father, the plaintiff filed a suit in the Court of the Subordinate Judge of Cuddalore to enforce the mortgage. He obtained a mortgage decree, but the Subordinate Judge excluded the properties covered by the second mortgage. In respect of these properties he was of the opinion that the mortgagee's claim was time-barred. The plaintiff has appealed from this finding.

The Subordinate Judge based his decision on the judgment of the Full Bench in *Pavayi* v. *Palanivelu*[2], but that case has no application here. There it was held that a mortgagor who had lost all interest in the mortgaged property and was not personally liable to pay the debt could not bind by an acknowledgment under section 19 or by a payment of principal or interest under section 20 of the Limitation Act, the person on whom his interest had devolved. In order to bind the assignee in such circumstances the acknowledgment or payment must be made before the mortgagor had parted with his interest in the property. We are concerned in the present case with the question whether a payment falling within section 20—made, of course, by a person entitled to do so—starts a new period of limitation which affects a second mortgagee whose charge was created before the payment.

A similar question arose in the recent case of *Thayyanayaki Ammal* v. *Sundarappa*[3], which was decided by a Bench composed of Wadsworth and Patanjali Sastri, JJ. Their decision supports in full the case for the appellant. In that case the suit was on a mortgage executed on the 4th June, 1913. The suit was instituted in 1937. The mortgagee relied on five endorsements evidencing part-payments by the mortgagor. These endorsements were dated respectively the 11th December, 1914, 9th April, 1916, 6th April, 1922, 23rd February, 1928, and 13th November, 1932. In 1917, the mortgagor had sold one of the properties covered by the mortgage and the question which the Court had to decide was whether the part payments by the mortgagor operated to save the right of suit against the purchaser. The Court held that a part-payment by a mortgagor who has parted with the mortgaged property, but is personally liable to pay under his covenant, saves the right of suit against the purchaser of the equity of redemption. A payment made by a person entitled to make the payment under section 20 of the Limitation Act creates a fresh period of limitation against all persons who might have been sued within the

1. (1920) 40 M.L.J. 218 : I.L.R. 44 Mad. 872 (F.B.).
2. (1940) 1 M.L.J. 766 : I.L.R. (1940) Mad. 308.
3. (1941) 2 M.L.J. 913 : I.L.R. (1942) Mad. 544.

prescribed period. That decision is binding on us and must be applied here. We may add that we respectfully agree with the judgment in that case. A payment which falls within section 20 of the Limitation Act starts a fresh period of limitation for an action on the debt against all persons who are liable thereon.

In *Lakshmi Naidu* v. *Gunnamma*[1], Varadachariar and Burn, JJ., held that section 20 dees not contemplate that when there are more persons than one liable in respect of a debt all of them should join in making a part-payment. A part-payment by one of the persons liable avails not merely against the person making it but also against other persons liable in respect of the debt. It may be added that in *Askaram Sowkar* v. *Venkataswami Naidu*[2], where it was held that a purchaser of the equity of redemption is a person liable to pay the mortgage debt within the meaning of section 20, it was pointed out that a second mortgagee was the person liable to pay the first mortgagee on the ground that he could only get the property by redeeming the first mortgage.

Accordingly we hold that the payment and the endorsement by the defendant of Rs. 50 towards interest on the 15th November, 1936, saves the full rights of the mortgagee.

The appeal will be allowed with costs here and below against respondents 4 to 6, who have contested the appeal.

B.V.V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Madhurakavi Ayyangar .. *Appellant** (*Petitioner*)

v.

Chinnasami Chetti and others .. *Respondents* (*Respondents*).

Madras Agriculturists' Relief Act (IV of 1938), sections 19 and 8—Person taking a mortgage of properties purchased by a puisne mortgagee in discharge of his mortgage after a mortgage decree had been passed in a suit by the first mortgagee—If a "judgment-debtor" entitled to apply for scaling down—Section 8 (2) and (3)—Payments by agriculturists alone to be regarded in applying the section—Sale in execution without applying Act IV of 1938—If material irregularity under Order 21, rule 90, Civil Procedure Code.

On a mortgage of 1913 there was a final decree in 1919. The seventh defendant was a puisne mortgagee who subsequently purchased part of the property in discharge of his own mortgage. In 1929 a portion of the mortgaged property was sold in execution of the decree. In 1932 after the present first defendant had been recognised as an assignee decree-holder, the second lot was proclaimed for sale. Then the seventh defendant put forward an uncertified adjustment of the mortgage decree and claimed that the decree was satisfied except for a small amount. This application was eventually withdrawn in 1936. In April, 1937, the seventh defendant mortgaged certain items of property purchased by him to the present appellant and died shortly thereafter. In July, 1937, a fresh proclamation was made and in August, 1938, a further portion of the hypotheca was sold and the sale confirmed. In April, 1939, the properties of which the present appellant was the mortgagee were brought to sale under the mortgage decree and purchased by the assignee decree-holder the first respondent, and before the confirmation of the sale the present appellant filed an application under section 47 and Order 21, rule 90 of the Civil Procedure Code to set aside the sale for material irregularity and another application under section 19 of Madras Act IV of 1938 for scaling down the mortgage decree on the footing that he was an agriculturist judgment-debtor entitled to the benefits of the Act in respect of the decree. In the circumstances,

Held, (1) the mere holding of the sale by the assignee decree-holder without first applying Act IV of 1938 in favour of a person like the appellant interested in the hypotheca would not amount to a material irregularity such as would justify the setting aside of the sale.

(2) Though the appellant had acquired an interest in the property bound by the mortgage decree long after the decree had been passed, he having acquired it before the 1st October, 1937, became liable to discharge the debt which bound the property and must be deemed to be a "judgment-debtor" entitled to apply under section 19 of Act IV of 1938 for scaling down the decree debt, if he is an agriculturist.

(3) Section 8 (2) and the complementary section 8 (3) of Act IV of 1938 both deal only with the effect of payments by an agriculturist and in scaling down the debt regard will have to be had to the question whether any of the payments proved to have been made towards the debt were payments

---

1. (1934) 68 M.L.J. 470 : I.L.R. 58 Mad. 418.
2. (1920) 40 M.L.J. 218 : I.L.R. 44 Mad. 544.

*A. A. O. No. 15 of 1941 and C. R. P. No. 651 of 1941. (C. M. A. No. 28 of 1941 converted into C. R. P.). 15th September, 1942.

made by an agriculturist. The decision of this question will be affected by the date of the death of any deceased person who had made payments.

Appeal against the order of the Court of the Subordinate Judge of Cuddalore, dated the 1st day of February, 1940, and made in E. P. R. No. 224 of 1939 in E. P. No. 119 of 1930 in O. S. No. 39 of 1915, etc.

S. V. Venugopalachari for Appellant.

N. Rangachari for Respondents.

The Judgment of the Court was delivered by

Wadsworth, J.—These two matters arise out of the execution of an ancient mortgage decree passed on a mortgage of 1913. The preliminary decree was passed in 1918 and the final decree in 1919. The present appellant and petitioner claims under the seventh defendant in the mortgage suit. The seventh defendant was a puisne mortgagee who subsequently purchased part of the property in discharge of his own mortgage. In 1929, a portion of the mortgaged property was sold in execution of the decree. In 1932, after the present first respondent had been recognised as an assignee decree-holder, the second lot was proclaimed for sale. Thereafter the seventh defendant put forward an uncertified adjustment and claimed that the decree was satisfied except for a small amount. This application was eventually withdrawn in 1936. In April, 1937, the seventh defendant mortgaged items 28 and 29 to the present appellant and petitioner. The seventh defendant died shortly thereafter. In July, 1937, a fresh proclamation was made and in 1938, a further portion of the hypotheca was sold, the sale being confirmed in August, 1938. Then in April, 1939, items 28 and 29, in which the present appellant-petitioner was interested as a puisne mortgagee, were brought to sale under the mortgage decree and purchased by the first respondent who is an assignee decree-holder. While this was pending confirmation, the appellant-petitioner filed two applications, one under section 47 and Order 21, rule 90 of the Code of Civil Procedure to set aside the sale for material irregularity, the dismissal of which application gives rise to C. M. A. No. 15 of 1941 ; the other was filed under section 19 of Madras Act IV of 1938 to scale down the mortgage decree on the footing that the applicant was an agriculturist judgment-debtor entitled to the benefits of the Act in respect of the decree. It is the dismissal of this application which has given rise to C. R. P. No. 651 of 1941.

The only ground on which the sale was attacked under the Civil Procedure Code was one which really depends on the uncertified adjustment which had been twice before put forward but never finally rejected. The material irregularity alleged was in fact based on the allegation that if this adjustment had been taken into account and Act IV of 1938 applied, the decree would have been satisfied and there would be nothing for which the sale could be held. But at the time when this sale was held no application had been filed to scale down the decree and it is by no means clear that the assignee decree-holder knew that the present appellant was entitled to the benefits of the Act ; in such circumstances we are of opinion that the mere holding of the sale without first applying Act IV in favour of the person interested in the hypotheca would not amount to a material irregularity such as would justify the setting aside of the sale. After all, before it can be shown that the decree is satisfied, the appellant has to establish a number of things and it is by no means clear that all these factors which he has to establish are self-evident. There being no application pending at the time of the sale under Act IV of 1938, it seems to us that there are no grounds for setting aside this sale. C. M. A. No. 15 of 1941 is therefore dismissed with costs.

The position with reference to the application under section 19 of Act IV is different. This application was rejected by the lower Court on the authority of the decision in *Narayanachari* v. *Annamalai Chettiar*[1]. That decision was subsequently overruled by this Bench in *Periaswami Chettiar* v. *Ramaswami Goundan*[2], wherein it was held that a puisne mortgagee against whom a decree has been passed is a judgment-

1. (1939) 2 M.L.J. 225. 2. (1940) 2 M.L.J. 513.

debtor entitled to scale down the decree affecting the property in which he is interested. In the present case the petitioner is not a puisne mortgagee against whom a decree has been passed. The decree was actually passed against the mortgagor under whom the petitioner claims, the petitioner having acquired his interest years after the passing of the decree. It remains therefore to be considered whether in such circumstances the petitioner can be said to be a judgment-debtor entitled to the benefits of the Act with reference to the mortgage decree which binds the property in which he has acquired an interest after that decree was passed. On this subject, the decision in *Palani Goundan* v. *Peria Goundan*[1] appears to govern the matter. In that case, we had to consider the position of a person who had purchased property already bound by a mortgage decree. We held that such a person was entitled to scale down that decree as a judgment-debtor, although not actually in the array of parties in the mortgage suit. We pointed out that in the absence of any definition of the term 'judgment-debtor' in Act IV of 1938, the term could be understood as including a person whose liability is a 'debt' as defined by the Act when the debt in question was a judgment-debt. It seems to us that the same line of reasoning must govern the present case. The petitioner by reason of his mortgage had before 1st October, 1937, acquired an interest in property bound by this mortgage decree and had therefore in the light of *Perianna's case* (*Perianna* v. *Sellappa*[2]) become liable to discharge the debt decreed. He must therefore be deemed to be a judgment-debtor entitled to apply under section 19 if he is an agriculturist.

It seems to have been assumed by the petitioner in his application that all payments made towards this mortgage debt are payments which have to be taken into account in applying section 8 (2) of the Act. We do not wish to prejudice the enquiry which will have to take place on this matter but confine ourselves to pointing out that section 8 (2) and the complementary section 8 (3) both deal only with the effect of payments by an agriculturist and in scaling down this debt regard will have to be had to the question whether any of these payments, if proved, are payments made by an agriculturist. The decision of this question will be affected by the date of the death of any deceased person who has made payments.

C. R. P. No. 651 of 1941 is therefore allowed and M. P. R. No. 257 of 1939 is remanded for fresh disposal in the light of this judgment. Costs in this Civil Revision Petition will abide by the result.

K.S. ——— *Petition allowed and C. M. A. No. 15 of 1941 dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNASWAMI AYYANGAR AND MR. JUSTICE KUNHI RAMAN.

Leelavathi Ammal .. *Appellant** (*Petitioner-Plaintiff*)

v.

Neni Kavur Bai . . .. *Respondent* (*Representative of Defendant*).

Practice—Application for execution against purchaser of property subject to attachment—Judgment-debtor adjudged insolvent—Official Assignee if to be impleaded in execution proceeding.

Pending a suit by her for recovery of money the appellant obtained an attachment before judgment of the properties in dispute on 19th April, 1939. On 6th January, 1940, the defendant in the suit sold the properties to the present respondent. On 10th January, 1941, the money suit was decreed and on 25th February, 1941, the judgment-debtor was adjudged insolvent. On 3rd May, 1941, the appellant filed an execution petition praying for realisation of the decree amount by sale of the attached property after bringing on record the respondent who had purchased the property and the Official Assignee. Notice went to the respondent only, the appellant stating in Court that she did not want the Official Assignee to be added as a supplemental defendant. On the question whether the petition was maintainable without the Official Assignee being made a party,

Held, it is settled law that a private alienation by the judgment-debtor of property attached by the decree-holder is not void absolutely but is only void against claims enforceable under the attachment. The adjudication of the debtor automatically puts an end to the attachment and vests the property in the Official Assignee free of the attachment, but it has no such efficacy as regards an alienation

1. (1940) 2 M.L.J. 887.
2. (1938) 2 M.L.J. 1068 : I.L.R. (1939) Mad. 218.

*A. A. O. No. 682 of 1941. 1st October, 1942.

made by the insolvent before his adjudication. The alienation stands good unless set aside by appropriate proceedings under section 55 or 56, Presidency Towns Insolvency Act or section 53, Transfer of Property Act, or the property was again vested in the insolvent at the commencement of the insolvency within section 52 (2) (*e*) of the Presidency Towns Insolvency Act.

The decree-holder is not obliged to implead the Official Assignee as a party in the execution proceedings as the Official Assignee has no present title to the property sought to be proceeded against in execution.

The provisions of the Civil Procedure Code relating to the joinder of parties in a suit have no application to proceedings taken for the execution of a decree after it is passed.

All that Order 21, rule 11 of the Code requires is that the names of parties to the suit should be mentioned and also the name of the person against whom the execution is sought. As execution was sought in the instant case against the purchaser of the property only the execution petition is maintainable without adding the Official Assignee.

Appeal against the order of the Additional City Civil Judge, Madras, dated 15th August, 1941, and made in E. P. No. 567 of 1941 in O. S. No. 1001 of 1939 on the file of the Civil City Court, Madras.

B. K. B. Naidu and *M. V. Ramaswami Naidu* for Appellant.

S. Ramanujachari for Respondent.

The Judgment of the Court was delivered by

Krishnaswami Ayyangar, J.—This is an appeal against the order of the Additional City Civil Judge, Madras, dismissing an execution petition filed by the appellant for the execution of a money decree obtained by her in O. S. No. 1001 of 1939 on the file of his Court. While the suit was pending the appellant had the property now in dispute attached before judgment. The attachment was made on 19th April, 1939. On 16th January, 1940, the defendant sold the property to the respondent who took it, of course, subject to all claims enforceable under the attachment. On 10th January, 1941, the appellant obtained a decree for Rs. 4,043-1-0 with subsequent interest. On 25th February, 1941, the judgment-debtor was adjudged insolvent and his estate vested in the Official Assignee, Madras. The present execution petition was filed on 3rd May, 1941, praying for the realisation of the decree amount by sale of the attached property after bringing on the record the respondent who had, as already mentioned, purchased the property pending the attachment and also the Official Assignee. Notice of the petition was issued to the respondent only, the appellant stating in the Court below that she did not want the Official Assignee to be added as a supplemental defendant. On the opposition of the respondent who was the only party before this Court, the petition has been dismissed as not maintainable. The ground of the decision, so far as we are able to gather, seems to be that the property attached, notwithstanding the alienation, vested in the Official Assignee on the insolvency of the judgment-debtor, that the appellant's remedy was to prove her debt in the insolvency and that it was not open to her to proceed in execution against the attached property without the Official Assignee being made a party.

It is settled law that a private alienation by the judgment-debtor of property attached by the decree-holder is not void absolutely but is only void against claims enforceable under the attachment. The adjudication of the debtor automatically puts an end to the attachment and vests the property in the Official Assignee free of the attachment, but it has no such efficacy as regards an alienation made by the insolvent before his adjudication. Until the alienation is set aside by appropriate proceedings taken under section 55 or 56 of the Presidency Towns Insolvency Act or section 53 of the Transfer of Property Act, it stands good unless again the property was vested in the insolvent at the commencement of the insolvency within section 52 (2) (*a*). It is not the case of the respondent that the property has vested in the Official Assignee by virtue of the last mentioned provision of law or that the alienation has been set aside by any proceedings taken by him. That being so, the Official Assignee has no present title to the property in question and we need not pause to consider whether he is entitled to take steps to have the alienation set aside by proceedings to be hereafter instituted. In *Chidambaram Chettiar* v. *Sellakumara Goundan*[1], a Full Bench of this Court was called upon to consider whether leave of the

1. (1941) 2 M.L.J. 684 (F.B.).

Insolvency Court is necessary before a creditor can institute a suit under section 53 of the Transfer of Property Act to set aside an alienation made by the debtor in fraud of creditors, before the commencement of the insolvency. It was held that the leave of the Insolvency Court is not necessary as even after the adjudication, the fraudulent alienation is not wholly void and, but is only voidable, and until avoided the title remains in the transferee and therefore the property does not form part of the estate of the insolvent which vests in the Official Assignee or the Official Receiver under the Insolvency Act. It was pointed out that a suit under section 53 in those circumstances was not really one respecting the property of the insolvent and it will not become the property of the insolvent until the Official Assignee obtains a declaration for setting aside the sale either under section 53 or, we may add, by other appropriate proceedings. We cannot therefore understand what purpose is to be served by adding the Official Assignee as a party in the execution proceedings and indeed we can see no reason why the decree-holder should be obliged to implead a person whose interest is not sought to be proceeded against.

In the above discussion we have used language which would appear to mean that the Code of Civil Procedure permits the joinder of parties in execution proceedings. In doing so we have only adopted the phraseology used in several reported cases. But we may point out that the use of such language is strictly speaking incorrect. Section 50 authorises a decree-holder to apply for the execution of the decree against the legal representative of the judgment-debtor, if he has died without fully satisfying the decree. Section 53 merely declares that a son or other descendant of the judgment-debtor liable under Hindu law for the payment of his debt shall be deemed to be his legal representative. Order 21, rule 11 only states the particulars that have to be mentioned in an execution petition and all that it requires is that the names of parties to the suit and the name of the person against whom execution of the decree is sought should be mentioned in this petition. Rule 22 only requires the issue of notice in certain cases to the person against whom execution is applied for requiring him to show cause on a date to be fixed why the decree should not be executed against him. There are certain other provisions such as those in rules 66 and 92 for the issue of notice to the parties affected and for the summoning of the obstructor under rule 97 and of the decree-holder or purchaser, as the case may be, under rule 100. These provisions can by no stretch of language be deemed to relate to joinder of parties in execution. They only provide for the issue of notice to parties sought to be affected by the proceedings taken. It is scarcely necessary to add that the provisions of the Code relating to the joinder of parties in a suit have no application to proceedings taken for the execution of a decree after it is passed.

Learned counsel for the respondent vehemently contended that it is impossible to conceive of a decree being executed without the judgment-debtor or his representative being made a party to the execution proceedings more especially when the decree sought to be executed is a money decree against the judgment-debtor. But we confess that we are unable to appreciate the contention. We have already explained at some length that the Code does not contemplate the joinder of parties in execution. All that Order 21, rule 11 requires is that the names of parties to the suit should be mentioned and also the name of the person against whom the execution is sought. In the present case execution is sought against the respondent and the respondent only. After the private alienation, the judgment-debtor ceased to have any interest in the property sold to the respondent, and the Official Assignee too has no manner of title to the property as it did not vest in him on account of the prior alienation which has not so far been set aside by him. The order of the learned Judge is therefore obviously wrong and it must be set aside, and the execution petition remanded to the Court below for disposal according to law, but this will be without prejudice to the right of the Official Assignee, if he is so advised, to take steps if he can to get in the property for the benefit of the creditors. There will be an order accordingly. The respondent must pay the costs of the appellant both here and in the Court below.

K.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE BELL.

T. Radhakrishnan Chettiar .. *Appellant** (*Respt.*)

v.

The Official Liquidator, Madras Peoples' Bank, Limited (In Liquidation) .. *Respondent* (*Applicant*).

Companies Act (VII of 1913), section 109 (1) (e)—Promissory notes in favour of banking company endorsed to a creditor as security for its indebtedness to him—Absence of registration under section 109 (1) (e)—Effect—Contract Act (IX of 1872), sections 172 and 148.

The endorsement by a banking company of certain promissory notes in its favour to a creditor as security for its indebtedness to him (the terms of the arrangement being embodied in a duly executed document) constitutes a valid pledge and therefore registration with the Registrar of Joint Stock Companies under section 109 (1) (*e*) of the Companies Act is not necessary. The transaction amounts to a bailment of the promissory notes and a bailment as security for the payment of the debt due to the creditor. Section 109 clearly contemplates that there can be a mortgage which is also a pledge. Where the transaction in question, though it may amount to a mortgage is also a valid pledge it does not require registration.

Appeal against the judgment and order of the Hon'ble Mr. Justice Gentle, dated 30th April, 1941, and made in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Application No. 475 of 1941 in O. P. No. 213 of 1939.

M. Ranganatha Sastri for Appellant.

O. T. G. Nambiar for Respondent.

The Court delivered the following

JUDGMENTS: *The Chief Justice.*—This appeal raises a question with regard to the meaning of section 109 (1) (*e*) of the Indian Companies Act. On the 5th February, 1938, the appellant placed with the Madras Peoples' Bank, Limited, a sum of Rs. 3,000 on fixed deposit for the period of one year. The Bank did not repay the money when it fell due and it was agreed that it should be redeposited, but that the amount should be split up into four sums of Rs. 500 each and one of Rs. 1,000, repayable on the 10th April, 25th April, 10th May, 25th May and 5th June, 1939, respectively. Being in financial difficulties the Bank was not able to repay any of these sums on the due date, but offered to indorse five promissory notes to the appellant as security for its indebtedness to him. The appellant agreed to this course and the terms of the arrangement were embodied in a document which was duly executed, but it was not registered with the Registrar of Joint Stock Companies.

On the 2nd November, 1939, this Court passed an order for the compulsory winding up of the Bank. The promissory notes indorsed to the appellant were of the aggregate face value of Rs. 4,476-13-3. They had been executed by debtors of the Bank as security for the moneys owed by them. It is common ground that after indorsement the promissory notes were delivered to the appellant, who instituted suits against the makers of these promissory notes, and that the net realisation was Rs. 1,173-3-9. On the 20th February, 1941, the Official Liquidator took out a Judge's summons calling upon the appellant to show cause why the agreement between the Bank and the appellant should not be declared void and why he should not pay over to the Official Liquidator the moneys collected on the promissory notes and indorse the instruments to him. The case of the Official Liquidator was that the agreement of the 29th June, 1939, required registration under section 109 of the Indian Companies Act and as this had not been done it was void as against him. The case was heard by Gentle, J., who found for the Official Liquidator and passed an order in terms of the prayers in the petition. The appeal is from that order.

Section 109 (1) (*e*) provides that a mortgage or a charge, not being a pledge, on any movable property of a company, except stock-in-trade, shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the Official Liquidator and any creditor of the company, unless the mortgage or charge has been registered with the Registrar of Joint Stock Companies within

* O. S. A. No. 32 of 1941. 5th February. 1942.

twenty-one days after the date of its creation. The learned Judge held that there was here a mortgage, not a pledge; and it was on this ground that he held the document to be void as against the Official Liquidator. For the appellant it is said that the transaction constituted a pledge and therefore registration of the document was not necessary. Other contentions have been advanced on behalf of the appellant, but as we consider that this argument is well founded it is not necessary to refer to them.

In the agreement of the 29th June, 1939, the Bank is referred to as the borrower and the appellant as the lender. Paragraph 1 states that the borrower in order to secure the sum of Rs. 3,000 and the interest thereon as and by way of security shall transfer by endorsement to the lender the promissory notes. Paragraph 2 provides that the appellant shall be at liberty to collect the amounts due on the promissory notes and shall credit the net realisations towards the amount due by the Bank. Paragraph 5 says that on payment to the appellant of any balance due to him he shall re-transfer to the Bank such of the promissory notes as may be outstanding. Admittedly the appellant became entitled to realise the securities as and how he pleased.

In *Halliday* v. *Holgate*[1], Willes, J., in delivering the judgment of the Exchequer Chamber, the other members of the Court being Blackburn, Keating, Montague, Smith and Lush, JJ., said :—

"There are three kinds of security; the first, a simple lien; the second, a mortgage, passing the property out and out; the third, a security intermediate between a lien and a mortgage, *viz.*, a pledge, where by contract a deposit of goods is made a security for a debt, and the right to the property vests in the pledgee so far as is necessary to secure the debt. It is true the pledgor has such a property in the article pledged as he can convey to a third person, but he has no right to the goods without paying off the debt, and until the debt is paid off the pledgee has the whole present interest."

Therefore the difference between a mortgage and a pledge of goods is that in the case of a mortgage the ownership of the goods passes, whereas in the case of a pledge the pledgee gets possession, but no right to the goods beyond what is necessary to secure the debt.

Section 172 of the Indian Contract Act defines 'pledge' in these words :—

"The bailment of goods as security for payment of a debt or performance of a promise is called 'pledge.' The bailor is in this case called the 'pawnor.' The bailee is called the 'pawnee'."

Section 148 which defines 'bailment' reads as follows :—

"A 'bailment' is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the 'bailor'. The person to whom they are delivered is called the 'bailee'."

Promissory notes are goods within the meaning of the Sale of Goods Act, *see* section 2 (7).

The transaction of the 29th June, 1939, amounted to a bailment of the promissory notes and a bailment as security for the payment of the debt due to the appellant by the Bank. Therefore all the requirements of the Contract Act for a valid pledge were fulfilled. While agreeing that this is so the learned Official Liquidator says that, inasmuch as the promissory notes were indorsed to the appellant, there was a transfer of the property to the appellant and therefore a mortgage. He then says that as there is a mortgage which is something more than a pledge, the transaction cannot be regarded as being a pledge. It seems to me that to accept this argument would amount to amending section 109 (1) (*e*) of the Indian Companies Act. The section clearly contemplates that there can be a mortgage which is also a pledge. In inserting the words "not being a pledge" in this clause the Legislature must have had some object in view and the only object I can see it could have had was to provide that registration should not be necessary where the person entitled to the security has obtained possession of the goods. The transaction now in question may amount to a mortgage, but as there are here all the requirements for a

1. (1868) L.R. 3 Exch. Cases 299.

valid pledge it is also a pledge, and being a pledge did not require registration. I would allow the appeal with costs, Rs. 250.

The Official Liquidator should refund the amount which he has received from the appellant and re-transfer the promissory notes and decrees to him.

Bell, J.—I agree.

K.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ABDUR RAHMAN AND MR. JUSTICE SOMAYYA.

The Madura, etc., Devasthanams, through its executive officer, R. S. Nayudu .. *Appellant* (Plaintiff)*

v.

R. Doraiswami Nayudu and another .. *Respondents (Defendants).*

Trust—Manager of Devasthanam—Charge of misconduct—Trustee acting upon report and accounts furnished by subordinate staff—No proof of wilful default—Plea of negligence—Proof of loss to estate—Failure to institute suits—Liability for damages.

The Madura Meenakshi Devasthanam sought to recover from the first defendant, who was the ex-trustee of the Devasthanam, a certain amount by way of damages. The claim was made on foot of gross negligence alleged to have been committed by him in allowing certain rents to become barred by limitation without instituting suits for their recovery, in permitting the execution clerk to withdraw certain amounts for the expenses of suits or executions which were never spent and in tendering no explanation with reference to certain items when called upon so to do. The first defendant pleaded that he had discharged his duties to the best of his abilities in furtherance of the interests of the Devasthanam and that he was not guilty of any negligence and that the Devasthanam had not suffered any damages on account of his conduct. It was proved that the Devasthanam owned extensive properties and there was nothing to show that any report was made about the arrears to the first defendant or that there was any wilful default on his part. And there was nothing in the rules framed under the scheme relating to the Devasthanam to prevent the work being carried on by the subordinate staff.

Held, that the *onus probandi* of proving actual loss and circumstances which would have rendered the first defendant liable was on the plaintiff Devasthanam and in the absence of any evidence on the record that the Devasthanam had suffered any loss and that the first defendant had been guilty of wilful default no decree could be passed against him merely because certain items or execution petitions had become barred by limitation.

Held, further, that the first defendant could not be held liable for the loss of monies not spent on the execution petitions, etc., as he was justified in acting upon the vouchers and accounts furnished by the law department of the Devasthanam, and that he could not also be made liable for the items for which no explanations were offered in the absence of proof that that those items were really due.

Appeal against the decree of the Court of the Subordinate Judge of Madura in O. S. No. 42 of 1938.

K. Rajah Aiyar and *T. A. Ramaswami Reddy* for Appellant.

V. Ramaswami Aiyar for Respondents.

The Judgment of the Court was delivered by

Abdur Rahman, J.—This appeal arises out of a suit brought by the Madura Meenakshi Devasthanam for a sum of Rs. 7,673-12-10 by way of damages against two persons, the first of whom is the ex-trustee and the other an execution clerk of the Devasthanam. The claim against the first defendant, with whom we are concerned in the present appeal, was made on account of gross negligence alleged to have been committed by him between the 12th November, 1930, and the 11th November, 1935, when he held the office of a trustee. The negligence is said to have consisted

(*a*) in allowing certain rents to become barred by limitation without instituting suits for their recovery;

(*b*) in permitting the second defendant (the execution clerk) to withdraw certain amounts for the expenses of suits or executions which were never spent and some of which were drawn twice over; and

(*c*) in tendering no explanation with reference to certain items when called upon so to do.

---

* Appeal No. 119 of 1940. 6th August, 1942.

The first defendant who was a Tahsildar in Government service and whose services were lent by the Government to the Devasthanam commented in his written statement on the absence of any averment in the plaint as to any wilful default or conscious omission of his in collecting and recovering amounts due to the Devasthanam. He pleaded that he had " discharged his duties to the best of his abilities in furtherance of the interests of the Devasthanam " and urged that in a big institution like the Madura Meenakshi Devasthanam which possessed extensive properties in several villages and towns and derived an income of about two lakhs of rupees annually, it was " impossible for any trustee to be conversant with each and every detail of the workings of the several departments and branches." It was pointed out by him in his written statement that the margin of non-collection and arrears that had to be written off was too low and " would compare favourably with such percentage in other similar institutions and even in Government departments." In short, he denied that he had been guilty of any negligence for which he could be held responsible or that the Devasthanam had suffered any damages in consequence of his conduct. In view of the various pleas raised by the defendants, several issues were framed but we are mainly concerned with the second issue which reads as follows :

" Whether all or any of the amounts mentioned in schedules A and B of the plaint were lost to the Devasthanam and how and when ; if so, who is responsible for the same."

Finding that the plaintiff Devasthanam was governed by a scheme as framed by the District Court of Madura in O. S. No. 4 of 1922 and modified by this Court in A.S. Nos. 209 and 210 of 1925 (Ex. R) and that the trustee was being governed by the rules framed thereunder, the trial Court was of the view that inasmuch as " the entire administration of the Devasthanam was vested in the trustee" and as" he was in full and exclusive control over all the servants and officials of the Devasthanam" it was his (the first defendant's) duty to keep regular accounts of all receipts and disbursements and his contentions that he had relied on his subordinates performing their duties properly and was immune as long as his attention was not invited to any particular irregularity could not be accepted. The same conclusion was drawn by the learned Subordinate Judge from section 48 of the Hindu Religious Endowments Act and from section 15 of the Indian Trusts Act. Holding that " a trustee is bound to conduct the business of the trust with the same care which an ordinary prudent man of business would take having regard to the interests of those for whom he feels bound to provide and that it was his duty to " realise all the debts due to the endowment as soon as possible " except when he considered an action to be fruitless or inexpedient, he proceeded to consider the various items claimed by the Devasthanam from the point of view whether the first defendant had used that degree of diligence and care which was expected of an ordinary prudent man of business and coming to the conclusion that the first defendant did not so act in regard to some of the items, the learned Subordinate Judge found the first defendant to be liable for Rs. 2,069-7-6. The rest of the claim was negatived. The plaintiff has appealed and wants the first defendant to be made liable for the entire amount claimed against him by way of damages. The first defendant has, on the other hand, filed cross-objections asking for the suit against him to be dismissed entirely.

In proceeding to decide this case on correct legal principles, it must not be overlooked that this is a suit for damages and the plaintiff came to the Court with the allegations that it had suffered damages as a result of gross negligence of the first defendant. Whatever might have been the case if this were a suit for accounts and the defendant had been called upon to render accounts in respect of monies which had come into his hands or which might have come into his hands but for his " wilful default " of which there is no allegation in this case, not to say of its proof on the record, the position is substantially different when a defendant is attempted to be made liable for damages alleged to have been suffered by a plaintiff as a result of the former's negligence. In that case, the mere proof of negligence (if negligence is found established and as to which we say nothing at present) is not sufficient to make the defendant liable. It should be definitely proved that the

plaintiff had suffered damages in fact as a result of the defendant's negligence. That is why the second issue was framed, we take it, in the form which it bears. And in spite of a definite issue no evidence was led on behalf of the Devasthanam to show whether the monies due from the tenants would have been recovered if suits had been instituted against them within the period of limitation prescribed by law.

Learned counsel for the appellant however contends that the onus of proving that no money would have been recovered even if suits had been instituted against the tenants was not on the plaintiff Devasthanam but on the first defendant who was admittedly a trustee, who must be taken to have committed a breach of duty in not instituting suits and who had allowed the rents due from the tenants to be barred by time. Reliance was placed in support of this contention on the decision in In re *Brogden*: *Billing* v. *Brogden*[1]. It is admitted on behalf of the appellant that the trustee had ample discretion not to institute suits if he were shown to have considered the matter and to have decided against their institution. But in the absence of any allegation or proof of the fact that he had deliberately refrained from filing the suits, the first defendant must be, it is contended, mulcted in damages and held liable for the amounts that he has allowed to be barred by limitation.

To contend that the first defendant must be held liable for the amounts for which the suits were not instituted by him without any proof on the record that if such suits had been instituted these sums would have been recovered and that by the non-institution of these suits, the plaintiff Devasthanam has lost in fact (not in getting the decrees, but in not realising the amounts which it would otherwise have), would be tantamount to saying that there was no distinction between the securing of decrees and recovering the amounts for which decrees would have been passed although we know, and as observed by their Lordships of the Privy Council in *The General Manager of the Raj Durbhunga* v. *Maharajah Coomar Ramput Singh*[2] that "the difficulties of a litigant in India begin when he has obtained a decree." A great gulf exists between obtaining decrees and their realisation and, unless it is shown that the decrees would have been realised if passed, it cannot be found that the Devasthanam had really lost any money or suffered any damage in consequence. In fact, if the tenants happen to be paupers, as a majority of them in this country unfortunately are, the non-institution of suits might have saved some good money from being thrown after bad and the Devasthanam would, in that case, be a gainer and not a loser. In giving his decision in In re *Brogden*: *Billing* v. *Brogden*[1] cited by learned counsel for the appellant, North, J., observed as follows :—

"But the second and equally important question remains for consideration whether, if the defendant *Budgett* had used due diligence in attempting to recover the trust funds, any good would have resulted therefrom. It is clear that the Court will not punish a trustee pecuniarily for his breach of trust except so far as loss has resulted therefrom to the trust estate. In other words, if no loss has been incurred, . . . there is nothing remaining for the trustee to make good . . . ."

And this proof of loss must be adduced by the plaintiff who asks for a decree for damages against the defendant. There is moreover no allegation in this case that there had been any wilful default on the part of the trustee. It is in evidence in this case that the Devasthanam owned 54 villages and possessed considerable wet and dry lands in several villages lying in the Districts of Madura, Ramnad, Trichinopoly and Tinnevelly. There were about 10,000 pattadars in these villages, and it is not surprising that with an annual income of two to three lakhs, the work of the office was being carried on by four sections (*a*) Revenue, (*b*) Law, (*c*) Treasury, and (*d*) General. The fact whether any rents or decrees were getting barred by time would, "in the ordinary course have to be reported by the law section." There is nothing to suggest that any report was made by that section to the defendant. How was the first defendant to know that the department was not doing its work properly? Relying on the observation in the judgment of the Court of Appeal in In re *National Bank of Wales, Ltd.*[3] to the effect that

"Business cannot be carried on upon principles of distrust. Men in responsible positions must

1. (1888) 38 Ch.D. 546 at 557.
2. (1872) 14 M.I.A. 605.
3. (1899) 2 Ch. 629 at 673.

be trusted by those above them, as well as by those below them, until there is reason to distrust them. We agree that care and prudence do not involve distrust; but for a director acting honestly himself to be held legally liable for negligence, in trusting the officers under him not to conceal from him what they ought to report to him, appears to us to be laying too heavy a burden on honest businessmen"

which was confirmed by the House of Lords in the case reported under the name of *Dovey* v. *Cory*[1], Romer, J., laid down in In re *City Equitable Fire Insurance Co.*,[2] as follows :—

"In respect of all duties that, having regard to the exigencies of business, and the articles of association, may properly be left to some other official, a director is, in the absence of grounds for suspicion, justified in trusting that official to perform such duties honestly."

There is nothing in the rules framed under the scheme which may lead us to infer that the first defendant was not to allow the work to be carried on by the law department or was not to repose confidence in the working of its officers. To hold the first defendant liable merely because he failed to devise "some method or device by which the first defendant as the controlling officer could have detected acts of delay on the part of his staff," as stated by the lower Court, is, in our opinion, to extend the scope of the rules to an extent that they were never intended to have and to place a burden on the first defendant which he could not possibly be allowed to shoulder.

Moreover there is no allegation in this case, as we said before, of any wilful, that is to say, intentional default by the first defendant. In order to be wilful it must have been shown that the first defendant knew that certain claims or applications for execution of decrees were going to be barred by limitation and that he had intentionally allowed them to be so barred. Learned counsel for the appellant contended that even independently of the rules framed under the scheme, it was the first defendant's duty to keep himself informed as to whether rent or execution applications were going to be barred and that he should be held liable for his ignorance which should be, in the circumstances, regarded as culpable. This is virtually the same argument although put in different words as had found favour with the lower Court. But we did not and do not agree with its soundness. It is almost impossible to conceive that a person in the position of the first defendant could have kept himself personally acquainted with the working of the minute details in every department when the institution was of the magnitude as the plaintiff Devasthanam happens to be and he could not but have reasonably acted on the assumption that the law department would do its duty and bring such matters to his notice. After all the law department was not acting in the capacity of an agent for the first defendant. But even if it were, it would be plaintiff's duty to show some wilful default of his before he could be held liable. In overruling the decision by Chitty, J., in In re *Brier*: *Brier* v. *Evison*[3], the Lord Chancellor observed:

"Now it appears to me here, that the person on whom the *onus probandi* lies has failed to inform the Court of the circumstances which it was absolutely necessary for the Court to know, before it could come to the conclusion that the loss by the agent's insolvency was due to some wilful default on the part of the executors."

For the above reasons we are of opinion that the *onus probandi* of proving actual loss and circumstances which would have rendered the first defendant liable was on the plaintiff Devasthanam and in the absence of any evidence on the record that the Devasthanam had suffered any loss and that the first defendant had been guilty of wilful default, no decree should have been passed against him merely because certain items or execution applications had become barred by limitation.

This is not however all. We are not satisfied in this case that the sums of money which are alleged to have been barred were really due from the tenants. It seems that new survey rates were introduced but they were decided by the Courts to be unlawful. But when the previous trustee, one Ramalinga Mudaliar, attempted to set right the accounts, he was not allowed so to do with the result that they (*i.e.*, the accounts) were thrown into confusion. It was not easy in the circumstances

1. (1901) A.C. 477.
2. (1925) 1 Ch. 407 at 429.
3. (1884) 26 Ch.D. 238.

to ascertain whether the monies shown to be due by the tenants in the Devasthanam books were really due.

The second ground on which the first defendant was attempted to be made liable, was that the second defendant was permitted to withdraw certain amounts for the expenses of suits or executions which were not shown to have been spent by him and in some cases monies are stated to have been drawn twice over for the same purpose. Mr. Rajah Aiyar, learned counsel for the appellant, contended that the first defendant should be held liable for lack of his supervision ; but the contention cannot be accepted when we find that the vouchers had been scrutinised by the various clerks in the law department which was under the control of a Law graduate and brought to the first defendant in the ordinary routine. There was nothing to excite his suspicion that the second defendant (who was not the first defendant's agent or servant) was trying to embezzle money by preparing false vouchers. As soon as the second defendant came under suspicion he was first of all transferred and then suspended and eventually prosecuted but before any further steps could be taken to remove him, the first defendant's period of office came to an end. The first defendant could not be held liable, in these circumstances, even if the test that a trustee is expected to devote the same care and attention to the business of the trust as an ordinary man would use in dealing with the interests of those which he is bound to protect is applied to the present case.

As to the items for which the first defendant was stated to have given no explanation in spite of the denials made on bahalf of the Devasthanam, our decision must be the same as there is nothing on the record to show that the items in regard to which explanations were asked for were due in fact. For the above reasons the plaintiff's appeal is dismissed with costs.

As for the cross-objections filed on behalf of the respondent, the first item to which exception had been taken is item 10 for a sum of Rs. 1,862-14-5. We have already referred towards the close of our judgment in the main appeal to the confusion in the Devasthanam books in regard to arrears and we are not satisfied that the arrears of kist for faslis 1337 and 1338 were really due by the tenants. The lower Court's reasoning that the explanation given by the first defendant in Ex. Q was " on the footing that the said sum of Rs. 1,862-14-5 was a real arrear," is based on a misapprehension. It was not admitted in the document that this money was due in fact. The objections in Ex. Q were apparently advanced on the assumption that if the arrears were found to be really due, the first defendant could not be, even in that case, held liable for the reasons given by him. It is clear from what has been stated in the last three lines of the first paragraph of Ex. Q. In the absence of proof that these sums of money were really due from the tenants, the question of their capacity to pay does not arise. We would therefore hold that the first defendant is not liable for this amount. As for item 9 which is for a sum of Rs. 20-7-0 the first defendant must be held liable as he, on his own showing, received the money on behalf of the temple and failed to remit it to the Devasthanam treasury. It may be that he had paid this money to the second defendant for being credited to the treasury ; but inasmuch as it was not a portion of the second defendant's duties to take any money from the first defendant and to deposit it into the treasury on his behalf, we are of opinion that this item was rightly allowed against the first defendant. As for the two applications for execution for Rs. 31-7-6 and Rs. 13-7-0 which form part of item 3 and in regard to the other seven cases which form part of the 5th item of B schedule we are, for the reasons given in our judgment in the appeal, of opinion that the first defendant could not be held liable in the absence of any proof of his wilful default and of the fact that the monies would have been recovered from the judgment-debtors if decrees were executed against them. The cross-objections in regard to all the items except item 9 should therefore be accepted. The plaintiff will, in the circumstances, pay the costs of the first defendant both in this and in the lower Courts.

B.V.V. ——— *Appeal dismissed and Cross-objections allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :— SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

Chakka China Sattiraju .. *Appellant** (*Auction purchaser-2nd counter-petitioner*)

v.

Ajjarapu Virayya and others .. *Respondents* (*Petitioners*).

Civil Procedure Code (*V of 1908*), *Order 21, rule 22* (*as amended in Madras in 1936*)—*Scope and applicability.*

A decree for maintenance was payable in two instalments, on the 1st April and 1st October respectively, in each year. On the 2nd October, 1934, the decree-holder applied for execution of her decree and on the 5th February, 1936, the property of the judgment-debtor was sold. A mortgagee of that property having deposited the decretal amount plus the solatium the sale was set aside on the 17th March, 1936. On the 1st October, 1936, the decree-holder filed an application for execution in respect of the instalments which fell due on the 1st April, 1935, 1st October, 1935, 1st April, 1936 and 1st October, 1936. The application was not in order and was returned for amendment. It was taken on the file on the 2nd November, 1936. Notice was issued on the 6th November, 1936, for the settlement of the sale proclamation. The sale was effected on the 28th June, 1937, and confirmed on the 7th August, 1937. In an application for setting aside the sale on the ground that no notice had been given under the provisions of Order 21, rule 22 of the Civil Procedure Code as more than one year had elapsed from the date of the decree,

Held, the second application for execution was governed by Order 21, rule 22 as amended in 1936 by the Madras High Court (the amended rule having come into force on 20th October, 1936) and as the period of two years provided for thereunder had not elapsed from the 17th March, 1936, it was not incumbent upon the Court to issue notice to the judgment-debtors to show cause why the decree should not be executed against them. Even the one year under the old rule should be deemed to commence not from the 1st April, 1935, when the first of the outstanding instalments fell due but from the 17th March, 1936. Accordingly the sale was not liable to be set aside.

Appeal against the order of the Court of the Subordinate Judge of Amalapuram, dated 16th July, 1938, in E. A. No. 73 of 1938 in O. S. No. 1 of 1921 (Additional Temporary Sub-Court, Rajahmundry).

B. Sitarama Rao for Appellant.

M. S. Ramachandra Rao, P. V. Vallabhacharyulu, A. Bhujanga Rao, K. Ramamurthi and *K. Someswara Rao* for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—The Subordinate Judge erred in setting aside the sale in favour of the appellant. On the 2nd October, 1934, the decree-holder (the third respondent) applied for the execution of her decree and on the 5th February, 1936, the property belonging to the judgment-debtors was sold. Within the time allowed by law the mortgagee of the property sold deposited the decretal amount, plus the solatium, and on the 17th March, 1936, the sale was set aside. The decree was for the payment of Rs. 300 per annum for the maintenance of the decree-holder. This sum was payable in two instalments, the first instalment on the 1st April and the second instalment on the 1st October in each year. On the 1st October, 1936, the decree-holder filed an application for the execution of her decree in respect of the instalments which fell due on the 1st April, 1935, 1st October, 1935, 1st April, 1936 and 1st October, 1936. The application was not in order and was returned to the decree-holder for amendment. It was taken on the file on the 2nd November, 1936, and on the 6th November notice was issued for the settlement of the sale proclamation. The sale was effected on the 28th June, 1937, and confirmed on the 7th August, 1937. On the 8th February, 1938, the first respondent (one of the judgment-debtors) and his brother, the second respondent applied for an order setting aside the sale on the ground that no notice had been given under the provisions of Order 21, rule 22 of the Code of Civil Procedure, as more than one year had elapsed from the date of the decree. The Subordinate Judge accepted this contention and ordered the sale to be set aside. The appeal is from this order and has been preferred by the purchaser at the auction.

---

* A. A. O. No. 568 of 1938. 4th December, 1942.

The attention of the Subordinate Judge was not drawn to the fact that when the second application for execution was taken on the file, rule 22 of Order 21 had been amended by this Court. The amended rule came into force on the 20th October, 1936. The old rule provided that where an application for execution was made more than one year after the date of the decree or one year after the date of the last order on a previous application notice should issue to the judgment-debtor to show cause why the decree should not be executed against him. The rule further provided that nothing in sub-rule (1) which contained the provisions referred to, should be deemed to preclude the Court from issuing process in execution of a decree without issuing the notice prescribed by sub-rule (1) if, for reasons to be recorded, it considered that the issue of such notice would cause unreasonable delay or would defeat the ends of justice. The omission to comply with the provisions of sub-rule (2) was considered sufficient justification for setting aside a sale. The old rule was considered to work unfairly and this Court amended it in two respects under powers conferred upon it by the Code. In the first place it altered the period of one year to two years. It further provided that the omission to comply with the requirements of sub-rule (2) should not make an order for the execution of a decree invalid unless the judgment-debtor had sustained substantial injury as the result of the omission.

The second application for execution in this case was governed by the amended rule; and as two years had not elapsed from the 17th March, 1936, it was not incumbent upon the Court to issue notice to the judgment-debtors to show cause why the decree should not be executed against them. The Subordinate Judge considered that one year should be deemed to run from the 1st April, 1935, when the first of the outstanding instalments fell due, and it was on this ground that he allowed the objection to the execution. We do not consider he was justified in taking this date as the starting point. The proper date was the 17th March, 1936. In any event the new application for execution was within two years of the 1st April, 1935. Consequently the appeal must be allowed with costs against the first and second respondents.

The learned advocate for these respondents has asked the Court to give directions with regard to the payment out of Court of the balance of the purchase consideration. This is a matter which must be raised before the Subordinate Judge.

K.S. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUPPUSWAMI AYYAR.

Maharbhan-I-Dosthan Sree Rajah Ravu Venkatakumara Mahipathi Suryarao Bahadur Garu, Sirdar, Rajahmundry Sircar and Maharajah of Pittapuram .. *Petitioner** (*Plaintiff*)

v.

The Municipal Council, Cocanada by the Commissioner .. *Respondent* (*Deft.*).

Madras District Municipalities Act (V of 1920), sections 81 and 83—Property tax levied—Gift of premises subsequently in the half year to educational institution—No right to claim refund of property tax.

Where subsequent to the levy of property tax but during the same half year in which the tax was levied the owner made a gift of the property to an educational institution, there is no scope for a refund of the proportionate share of the property tax merely because the building came to be used as an educational institution subsequent to the levy of the tax. Exemption can be claimed under section 83 only at the time of the levy if the building is used as an educational institution.

Petition under section 25 of Act IX of 1887, praying that the High Court will be pleased to revise the decree of the Court of the District Munsiff of Cocanada, dated 20th November, 1941, and passed in S. C. S. No. 269 of 1941.

Ch. Raghava Rao for Petitioner.

K. Bhimasankaram for Respondent.

The Court delivered the following

JUDGMENT.—The plaintiff in Small Cause Suit 269 of 1941 on the file of the District Munsiff's Court of Cocanada seeks to have the decree therein revised

* C. R. P. No. 235 of 1942. 25th November, 1942.

dismissing his suit for recovery of a portion of the amount paid by him as property tax for a building within the limits of the municipality of Cocanada. The building in question belonged to the plaintiff Maharajah on the date on which the property tax was levied. Subsequent to the levy but during the half-year in which the tax was levied he made a gift of it to an educational institution. He therefore sought to recover the portion of the tax paid by him which according to him represented the tax for the period during which the building was used by the educational institution. The learned District Munsiff held that the levy was proper as on the date of the levy the building was a private building and that the plaintiff was not entitled to a refund because there is no provision in the Act for a refund of the tax paid under such circumstances.

Section 81 of the District Municipalities Act provides for a levy of property tax

"on all buildings and lands within municipal limits save those exempted by or under this Act or any other law."

Section 82 provides for the method of assessment. Section 83 states what all buildings and lands are exempt from property tax ; and under that section buildings used for educational purposes including hostels, public buildings and places used for the charitable purpose of sheltering the destitute or animals, and libraries and playgrounds which are open to the public are exempt from such tax. Section 86 states:

"The property tax shall be levied every half-year and shall, save as otherwise expressly provided in Schedule IV, be paid by the owner of the assessed premises within thirty days after the commencement of the half-year."

As within 30 days from the commencement of the half-year in which the levy was made the building was a private building, the levy was valid. The levy is not *for* a half-year but *in* a half-year, and so it cannot be said that the mere fact that for a portion of the half-year it was used as an educational institution, will entitle the person who paid the tax to get a refund of the proportionate share of the amount. Under section 83 the exemption can be claimed only at the time of the levy if the building is used as an educational institution. When once it is levied the levy is complete and no refund can be had unless it is provided in the Act. The Act provides for a refund when the building is demolished or when it is not in occupation of a private owner. The learned District Munsiff was therefore perfectly justified in finding that there was no scope for a refund of the proportionate share of the tax merely because the building came to be used as an educational institution subsequent to the levy of the tax.

The revision petition is dismissed with costs.

K.S. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ABDUR RAHMAN.

M. S. Venkita Rama Iyer .. *Petitioner* (Plff.)*

v.

Ulattil Pachu's son Kunhi Kandan .. *Respondent (Deft.).*

Madras Debt Conciliation Act (XL of 1936), section 27—Time taken in obtaining certified copies of Board's orders excluded for purposes of limitation for suit—Computation—Copies sent by post under rule 22 of rules framed under section 29—Effect.

The only procedure provided under the Debt Conciliation Act for delivery of certified copies of its orders is to send them by post. In computing the period of limitation for filing a suit by a creditor on a promissory note regarding which he had made an application to the Debt Conciliation Board the period between the date when the copies of the Board's order were ready for delivery and the date of the actual delivery of the copies by the post office to the creditor must be excluded under section 27 of the Debt Conciliation Act as time taken in obtaining the certified copies of the Board's orders.

Where copies are sent to the parties by the Board under rule 22 of the rules framed under section 29 of the Act, the post office must be held to be the agent of the copying department of the Board and not of the party.

---

* C. R. P. No. 2458 of 1941. 6th November, 1942.

Petition under section 25 of Act IX of 1887, praying that the High Court will be pleased to revise the decree of the Court of the Subordinate Judge of South Malabar at Calicut, dated 18th July, 1941, and passed in S. C. S. No. 2 of 1941.

N. R. Sesha Aiyar for Petitioner.

D. A. Krishna Variar for Respondent.

The Court delivered the following

JUDGMENT.—The only question to decide in this revision is one of limitation.

The suit out of which this revision arises was brought on the basis of a promissory note executed on the 25th July, 1937. The suit was instituted on the 3rd January, 1941. Apparently, therefore, it would be barred by time. But the petitioner relies on section 27 of the Madras Debt Conciliation Act, 1936, and contends that in calculating the period of limitation, the time during which the proceedings taken by him before the Debt Conciliation Board were pending as well as the time taken by him for obtaining the certified copies of the order of the Board should be excluded. He made an application to the Board on the 23rd July, 1940, that is, two days before his limitation for the civil suit expired. He asked for leave to withdraw the application on the 13th December, 1940. This was ordered the next day. On the same date he applied for a copy of the order and the order for granting copies was made on the 16th December, 1940. The copy delivered to him shows that it was ready on the 18th December, 1940, but it seems that the Collector signed this copy on the 19th December, 1940. This shows that the copy was not ready on the 18th December and could only have been ready for despatch on the following day. But it was not sent by post on that day. The post office seal shows that it was actually despatched on the 21st December, 1940. The next day (*i.e.*, the 22nd December) being a Sunday the copy was delivered to the petitioner on the 23rd December which was the last working day before the Christmas recess. The suit was instituted by him on the 3rd January, 1941, the date on which the Courts re-opened.

The question therefore to decide is whether the petitioner can get the benefit of the time spent by him from the 3rd July up to the 23rd December, 1940. That he is entitled to exclude the days during which the proceedings were pending before the Debt Conciliation Board is not open to doubt. Nor can it be disputed that he would be entitled to exclude the time taken "for the obtaining of certified copies of the order of the Board" under section 27 of the Debt Conciliation Act, 1936. Had he therefore taken delivery of the copies on the 19th December, 1940, he would have been entitled to exclude that period. But the copy was sent to him by post on the 21st December and delivered on the 23rd of that month. The question is whether the period from the 20th December, 1940, to the 23rd December, 1940, can also be excluded.

Learned counsel for the respondent contended that the petitioner cannot get credit for these days and that it was his duty to obtain the copies from the Conciliation Board office on the 19th December, 1940—the date on which they were ready. He also urged that the post office, under the circumstances, was his agent and the delivery of the copies to the post office was therefore tantamount to delivery to his agent on his behalf. It appears, however, that certain rules have been framed by the Government of Madras under section 29 of the Madras Debt Conciliation Act. Rule 22 provides that

> "the rules regarding grant of certified copies in Order No. 173 of the Standing Orders of the Board of Revenue, as for the time being in force, shall be followed in granting copies of the records maintained by the Board."

I must therefore look into the Standing Order No. 173 of the Board of Revenue to find as to how the copy had to be delivered to the petitioner. The Standing Order seems to have been changed from year to year but the last one which is relevant reads as follows :

> "The copies should then be certified as true under the signature of an officer authorised to do and should be sent to the applicant with the unused copy stamp papers, if any, by post in an official cover superscribed 'certified copies-service unpaid' or 'certified copies and copy stamp papers-service unpaid' as the case may be."

It was under this rule that the copies were sent to him by post. The rule does not require the petitioner to come and take delivery of the copies from the Debt Conciliation Board Office but required the Debt Conciliation Board Office on the other hand to send the copies when ready by post. If that be so, the Post Office must be, under the Standing Order, held to be an agent of the copying department and not that of the petitioner. The only procedure provided by the Standing Order for the delivery of copies is to send them by post: and the taking delivery by a petitioner personally from the office is not contemplated at least in the first instance and cannot be insisted upon. In that view the days from the 20th to the 23rd December, 1940, must also be excluded. It is hardly necessary to point out that the decisions under section 12 of the Indian Limitation Act to which reference was made by Mr. Krishna Variar during his arguments were not relevant in this case. It is the rules framed under section 27 of the Debt Conciliation Act that have to be looked at.

For the above reasons, the decision of the lower Court must be set aside and the case sent back for disposal after consideration of any other point or points that may have been raised in the case. The costs of this petition will be costs in the cause.

K.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BYERS.

Raju Naidu and another .. *Petitioners* (Accused).*

Motor Vehicles Act (IV of 1939), section 71 (2)—Speed limit prescribed by regional authority—Absence of publication in Gazette—Conviction for exceeding speed limit—Sustainability.

The provisions of section 71 (2) of the Motor Vehicles Act are mandatory and it is necessary before the imposition of a speed limit by the regional transport authority can be enforced that there should be a prior notification in the Gazette. Where there is no such notification a person cannot be convicted for the offence of exceeding the speed limit.

Petitions under sections 435 and 439 of the Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgments of the Court of the Sub-Divisional Magistrate, Coimbatore, dated 11th June, 1942 and 19th June, 1942 and passed in C. A. Nos. 31 and 35 of 1942 respectively (C. C. Nos. 268 and 315 of 1942 on the file of the Court of the Town Sub-Magistrate, Coimbatore).

K. S. Jayarama Ayyar and *G. Natarajan* for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—Although the petitioners in these two cases are different the point raised in revision by each of them is the same, so a common order for their disposal will suffice. The petitioners have each been convicted of exceeding local speed limits, in Coimbatore, punishable under section 115 read with section 71 of the Motor Vehicles Act, and have been sentenced to pay fines of Rs. 50 and Rs. 30 respectively with simple imprisonment in default of payment.

There is no dispute about the facts. Both the petitioners were detected exceeding the speed limit on different roads within the municipality and the only point taken in revision is that the imposition of the speed limits by the regional transport authority under rule 412 of the rules framed under the Act had not been notified in the Official Gazette in accordance with section 71 (2) of the Act. At the time of admitting these petitions, Mr. Jayarama Ayyar, the petitioners' learned advocate in each case, pointed out that there was no evidence of any notification in accordance with the Act, but at the time of hearing he has further contended that there was not only no evidence of any notification but that no notification had ever been made. The learned Public Prosecutor concedes that there has in fact been no notification in the Official Gazette as laid down by section 71 (2) and in view of this he is not in a position to support the convictions. The provisions of section 71 (2)

---

* Crl. R. Cases Nos. 571 and 572 of 1942. 26th October, 1942.
(Crl. R. Ps. Nos. 544 and 545 of 1942).

of the Act are mandatory and it is necessary before the imposition of a speed limit can be enforced that there should be a prior notification in the Gazette.

In the result the petitions are allowed, the convictions are set aside and the fines if collected are ordered to be refunded.

B.V.V. ——— *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Makky Moithu and others .. *Petitioners* (Accused).*

Evidence Act (I of 1872), section 124—Public document—Communication by Tahsildar to Collector—Decision of Court that it is a public document—Discretion of officer not to reveal it to the public not to be questioned..

On the question whether a certain report made by the Deputy Tahsildar in charge of a Government Forest to the Collector was privileged;

Held, that section 124, Evidence Act, left it to the Court to consider whether the communication was of the nature covered by the section ; that is, the Court has to decide whether the section can be applied. If it does, the Court has to exclude the document if the public officer concerned considers that the public interests will suffer by the disclosure.

Where the report was undoubtedly a confidential document and was not intended to be revealed to the public but only to such persons to whom the Collector thought fit to send it, the Court cannot question that decision.

Petition under sections 435 and 439 of the Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the Sub-Divisional Magistrate, Calicut, dated 26th January, 1942 and passed in C. A. No. 44 of 1941 preferred against the judgment of the Court of the Second Class Magistrate of Quilandy, dated 25th November, 1941, and passed in C. C. No. 988 of 1940.

P. S. Narayanaswami Ayyar for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—The petitioners were convicted by the Sub-Magistrate, Quilandy, under sections 109 and 379, Indian Penal Code, for cutting trees and taking them away from the Government forest and their convictions were confirmed in appeal by the Sub-Divisional Magistrate of Calicut.

This petition was admitted on two points : firstly, whether there was any evidence on which the conviction of the first accused could be based and, secondly, on the question whether a certain report made by the Deputy Tahsildar in charge of the forest in question to the Collector is privileged. On the first point, the only evidence against the first accused is the admission of the second accused that he had committed the offence at the instigation of the first accused and the presence of the marks of the first accused on the trees. The admission of the second accused is an exculpatory statement in so far as the first accused is concerned ; for he merely transfers the blame from his own shoulders to those of the first accused. Moreover, his confession can only be taken into account against the first accused when there is other positive evidence. The presence of the first accused's marks on the trees shows little more than that the second accused was the first accused's agent or servant. The first accused's defence was that he had asked his servants to cut trees in some other place. This explanation is not inconsistent with the evidence. There was therefore no legal evidence against the first accused on which a conviction could be based. The conviction and sentence of the first accused are therefore set aside and that accused acquitted.

Section 124 of the Indian Evidence Act says:

"No public officer shall be compelled to disclose communications made to him in official confidence, when he considers that the public interests would suffer by the disclosure."

This section leaves it to the Court to consider whether the communication was of the nature covered by the section, *i.e.*, the Court has to decide whether the section can be applied. If it does, the Court has to exclude the document if the public

* Crl. R. Case No. 212 of 1942. .. 6th August, 1942.
(Crl. R. P. No. 199 of 1942).

officer concerned considers that the public interests will suffer by disclosure. The Court cannot question his decision on that point. This report from the Deputy Tahsildar to the Collector was undoubtedly a confidential document. It was not intended to be revealed to the public but only to the person to whom it was addressed and to such persons to whom the Collector thought fit to send it. The Collector has sent the document to the Public Prosecutor and I have perused it. There is nothing in the document which would help the accused. On the contrary, it seems to have been in the accused's best interests that this document was not shown to the Court.

There is no reason why I should interfere with the conviction and sentence passed on the second and fourth accused.

K.C. ——— *Conviction of first accused set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

Angammal and another .. *Appellants** (*L. R. of 6th Deft. and 7th Deft.*)

v.

Punnammal and others .. *Respondents* (*L. R. of Plff. and Defts. 2 to 5*).

Mortgage—Usufructuary mortgage—Provision that if mortgage is not redeemed within two years mortgagee should become absolute owner—Void—Limitation for redemption.

A provision in a usufructuary mortgage deed that the mortgagee should be regarded as the absolute owner of the property at the end of two years should the mortgagor fail to redeem the mortgage within that period is absolutely void. The principle, once a mortgage always a mortgage, applies and the mortgagor and his heirs have sixty years in which to redeem.

Meharban Khan v. *Makhena*, (1930) 58 M.L.J. 714 : L.R. 57 I.A. 168 : I.L.R. 11 Lah. 251 (P.C.); *Perayya* v. *Venkata*, (1888) I.L.R. 11 Mad. 403 and *Srinivasa Iyengar* v. *Radhakrishna Pillai*, (1913) 26 M.L.J. 47 : I.L.R. 38 Mad. 667, relied on.

Usman Khan v. *Dasanna*, (1912) 23 M.L.J. 360 : I.L.R. 37 Mad. 545 and *Kandaswami Pillai* v. *Chinnabha*, (1920) 40 M.L.J. 105 : I.L.R. 44 Mad. 253, distinguished.

Appeal under section 15 of the Letters Patent against the judgment and decree of the Hon'ble Mr. Justice Burn, dated 27th August, 1941, and made in C. C. C. A. No. 22 of 1939 preferred against the decree of the Court of the City Civil Judge, Madras, in O. S. No. 505 of 1936.

K. Rajah Aiyar and *M. R. Vijayarangam* for Appellants.

V. Ramaswami Aiyar, *M. Ramachandran*, *K. S. Narayana Aiyangar* and *T. Munuswami Reddi* for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—On the 26th August, 1912, one Kesavan granted to the first defendant a usufructuary mortgage of the property in suit. The deed provided that if the mortgage was not redeemed within two years the mortgagee should become the absolute owner of the property. The mortgagor defaulted in payment of the amount due under the mortgage and the first defendant considered himself to be the absolute owner. On the 14th February, 1931, the first defendant and his son purported to mortgage the property to one Devasikamani Mudaliar, who on the 29th August, 1932, assigned the mortgage to the third defendant. The third defendant instituted C. S. No. 121 of 1934 in this Court to recover from the first defendant the amount due on the mortgage. He obtained a decree and in due course the property was put up for sale in the execution proceedings. The plaintiff was the purchaser. When he went to take possession he was resisted by the fourth defendant, the son of Kesavan, and the fifth defendant, who is the son of the fourth defendant. On the 21st July, 1936, the fourth and fifth defendants purported to sell the property to the sixth and seventh defendants. This led the plaintiff to file in the City Civil Court the suit which has given rise to this appeal. He sought

*L. P. Appeal No. 56 of 1941. 24th November, 1942.

a declaration of his title to the property or in the alternative a decree for the return of the money which he had paid for its purchase. The City Civil Court dismissed the suit, but on appeal to this Court it was decreed by Burn, J. The present appeal is under clause 15 of the Letters Patent from the judgment of the learned Judge. The appellants are the legal representatives of the sixth defendant and the seventh defendant.

The learned Judge considered that the clause in the deed of mortgage of the 26th August, 1912, which purported to confer upon the first defendant an absolute title in the event of the mortgagor failing to pay the mortgage debt within two years, had the effect of making his possession adverse at the expiration of the two years and as more than twelve years had elapsed Kesavan's heirs had lost all interest in the property. Burn, J., relied on the decisions of this Court in *Usman Khan* v. *Dasanna*[1] and *Kandaswami Pillai* v. *Chinnabha*[2]. When those decisions are examined, it is clear that they embody quite a different principle. The principle which does apply in this case is expressed in the decision of the Privy Council in *Meharban Khan* v. *Makhena*[3] and in *Perayya* v. *Venkata*[4] and *Srinivasa Iyengar* v. *Radhakrishna Pillai*[5]. Unfortunately these cases were not brought to the notice of the learned Judge.

Section 60 of the Transfer of Property Act provides that the right to redeem a mortgage can be extinguished by act of the parties, and this provision is to be borne in mind in considering *Usman Khan* v. *Dasanna*[1] and *Kandaswami Pillai* v. *Chinnabha*[2]. In the former of these two cases the mortgage deed provided that, in default of the payment of the mortgage debt within the time fixed, the mortgagee should take possession of the property as the absolute owner. Default was made in the payment of the mortgage debt, but the mortgagee did not go into possession by reason of the mortgage deed, but as the result of an agreement which was entered into after the period stipulated in the mortgage deed for payment. This further document provided for the payment of Rs. 250. The Court held that by reason of this further agreement there was a relinquishment by the mortgagor of all rights to the property. The Court did not place any reliance on the mortgage deed. The decision that the mortgagor had lost title by adverse possession of the mortgagee was based entirely on the subsequent agreement which was lawfully entered into under section 60 of the Transfer of Property Act. The facts in *Kandaswami Pillai* v. *Chinnabha*[2] are analogous. There at a date subsequent to the mortgage, there was an oral agreement whereby the mortgagee retained possession of a portion of the mortgage property as the absolute owner in satisfaction of the mortgage debt. He was in adverse possession for more than twelve years, and following *Usman Khan* v. *Dasanna*[1], the Court held that the suit by the mortgagor for redemption of the property was out of time.

In the case before us the plaintiff did set up a subsequent oral agreement between Kesavan and the first defendant, but it was disbelieved by both the trial Court and Burn, J. Therefore the plaintiff can only rely on the stipulation in the mortgage deed itself. It is clear from the judgment of the Privy Council in *Meharban Khan* v. *Makhena*[3] that this does not help him. In that case there was a usufructuary mortgage, which provided for redemption at the end of 19 years; in default of the payment of the mortgage debt the mortgagee was to have an absolute interest in the property. The Board considered that there was here a clog on the equity of redemption and the provisions of the deed had no more binding force against the assignee of the mortgagor than they had against the mortgagor himself. They were not provisions of general validity avoided against the mortgagor personally by reason of pressure or undue influence brought to bear on him. They were provisions which, when forming part of the actual mortgage contract, had under the general law no validity at all. If it were otherwise an illogical result would follow. The mortgagor, if he redeemed, would escape from the burden, but if

1. (1912) 23 M.L.J. 360: I.L.R. 37 Mad. 545.
2. (1920) 40 M.L.J. 105: I.L.R. 44 Mad. 853.
3. (1930) 58 M.L.J. 714: L.R. 57 I.A. 168: I.L.R. 11 Lah. 251 (P.C.).
4. (1888) I.L.R. 11 Mad. 403.
5. (1913) 26 M.L.J. 47: I.L.R. 38 Mad. 667.

he sold to another he would necessarily bear the burden, as the validity of the provisions as against the assignee would be reflected in the price which he received.

This case was from the North-West Frontier Province where the Transfer of Property Act is not in force, but the same principle is applicable where the Act is in force. In *Perayya* v. *Venkata*[1], a Bench of this Court held that a provision in the deed of mortgage that, in default of payment by a certain date, the mortgage should be deemed to be an absolute sale does not amount to an extinguishment of the right of redemption within the meaning of section 60 of the Transfer of Property Act. It was pointed out there that there was no extinguishment of the right by act of parties when, by virtue of a stipulation contained in the very contract under which the right is created, that right ceases to exist. The decision of this Court in *Srinivasa Iyengar* v. *Radhakrishna Pillai*[2] was to the same effect and *Perayya* v. *Venkata*[1] was expressly followed.

Therefore the provision in the mortgage deed that the first defendant should be regarded as the absolute owner of the property at the end of two years should the mortgagor fail to redeem the mortgage within that period was absolutely void; and here there has been no subsequent agreement which would bring the case within *Usman Khan* v. *Dasanna*[3] or *Kandaswami Pillai* v. *Chinnabha*[4]. The principle, once a mortgage always a mortgage, applies and Kesavan's heirs have sixty years in which to redeem. That period has not expired and therefore the first defendant and those who stand in his shoes can only be regarded as mortgagees.

The appeal will be allowed and the suit dismissed with costs of the appellant against the plaintiff who is now represented by respondents 1 to 4 throughout.

K.S. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMAYYA.

Srinivasalu Chetti and another .. *Appellants** (*Plffs.*)

v.

Munisami Chetti and others .. *Respondents* (*Defts.*).

Limitation Act (IX of 1908), section 6 and article 125—Alienation by limited owner—Reversioner then alive being minor—Subsequently born nearer reversioners—Suit for declaring alienation not to be binding on reversion—Time limit—Extended period of limitation whether available.

If the existence of a reversioner clothes an after-born reversioner with a right to sue, though an after-born reversioner cannot claim the benefit of section 6 of the Limitation Act in his own right, he cannot be deprived of the extended period available to the reversioner in existence at the time of the alienation.

The plaintiffs sued as reversioners for a declaration that certain alienations of the properties of their maternal grand-father were not binding on them beyond the lifetime of their mother. In 1920, when the primary alienation was made the plaintiffs were not born, and there was then in existence another reversioner who was an infant one year old. The two minor plaintiffs who were subsequently born sued by their next friend in 1937, and at that time the person who was the nearest reversioner at the time of the alienation but had ceased to be so on the birth of the plaintiffs was also alive. The defendants contended that the suit was barred by limitation.

Held, that the suit was not time-barred as the plaintiffs were entitled to institute the suit at any time during which the person who was the nearest reversioner at the date of the alienation could have filed the suit, and that they were also entitled to the extended period available to that reversioner by virtue of his minority.

Gobind v. *Ram Lal*, (1937) I.L.R. 18 Lah. 395 and *Dhanraj Rai* v. *Ram Naresh Rai*, (1924) 79 I.C. 1019, relied on.

Udayamuthier v. *Shunmugham Chettiar*, (1934) 41 L.W. 610 and *Ranodip Singh* v. *Parameshwar Pershad*, (1924) 48 M.L.J. 29 : L.R. 52 I.A. 69 : I.L.R. 47 All. 165 (P.C.), considered.

Appeal against the decree of the Court of the Subordinate Judge of Vellore in A. S. No. 87 of 1940, preferred against the decree of the Court of the District Munsiff of Vellore, in O. S. No. 296 of 1937.

---

1. (1888) I.L.R. 11 Mad. 403.
2. (1913) 26 M.L.J. 47 : I.L.R. 38 Mad. 667.
3. (1912) 23 M.L.J. 360 : I.L.R. 37 Mad. 545.
4. (1920) 40 M.L.J. 105 : I.L.R. 44 Mad. 253.

* S. A. No. 461 of 1941. 26th November, 1942.

B. V. Viswanatha Aiyar for Appellants.

K. S. Desikan and *T. V. Ramanatha Aiyar* for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiffs who are the appellants in this second appeal filed the suit for a declaration that certain alienations of the properties of their maternal grandfather are not binding on them after the death of their mother who was impleaded as the second defendant. The suit was dismissed by both the lower Courts but on different grounds.

The defendant raised two defences ; one was that as a result of a certain compromise, the second defendant became the absolute owner and the other was that the suit was barred by limitation.

The trial Court holding that the compromise conferred an absolute right on the second defendant dismissed the suit on that ground. The appellate Court held that under the compromise the second defendant did not get an absolute interest ; but upheld the dismissal of the suit on the ground of limitation.

The plaintiffs appeal and urge that the suit is not barred and the respondents urge that the compromise validly conferred an absolute right on the second defendant. Hence both the questions have to be decided in this second appeal. On the first question I agree with the Subordinate Judge that the compromise does not confer an absolute right on the second defendant. Seenureddi, the maternal grandfather of the plaintiffs died about 1902 and the plaintiffs' case is that Papireddi the father of Seenureddi had become divided from his father's brother's grandson Balureddi in or about 1898. After Seenureddi's death, his widow and his mother together executed a sale of some properties to the fourth defendant herein. Balureddi sold the same properties to one Ramachandra Naidu evidently on the footing that there was no division between himself and Papireddi and that he got the properties by survivorship.

The fourth defendant then filed a suit impleading Balureddi, the widow, the mother and the daughter of the last male holder Seenureddi. The suit was compromised and the terms of the compromise are set out in Ex. A. Under Ex. A, the division between Papireddi and Balureddi is recognised as having taken place. Under this compromise, subject to certain conditions with which we are not now concerned, the widow and the daughter were given the right to enjoy the properties with absolute rights. It is clear that there was a division between the two branches. It is not said in this suit that there was no division ; in fact the compromise itself recognised the division. This being so, it is not open to the limited owners and the reversioners acting together to confer absolute rights on the limited owners. The Subordinate Judge's view is clearly right.

The next question is one of limitation. Though the defendants in this suit claim under different private and Court sales, they are all for discharge of the mortgage under Ex. C, which is a renewal of the mortgage under Ex. B. Both these were executed in 1920. At that time the nearest reversioner was Balureddi's son, Munivenkata Reddi, an infant one year old. Balureddi had evidently died before then. The present suit is filed by the two plaintiffs who were born later, the first plaintiff having been born in 1922.

Munivenkata Reddi is still alive and a suit by him would be in time if filed before 1940. The present suit was filed in 1937. Plaintiffs being daughter's sons are now the nearest reversioners and Munivenkata Reddi has become a remoter reversioner. As long as Munivenkata Reddi was the nearest reversioner the right of action vested in him and plaintiffs having stepped on their birth into that position, they should, I think, have at least the same period as Munivenkata Reddi had to file the suit.

When the alienation was made it was open to attack in a suit filed before 1940. How then is it cut down merely because others take the place of the nearest reversioner? This is not a case where after the expiry of the period for a suit by the then nearest reversioner, another reversioner wishes to take the benefit of his own

minority under section 6 of the Limitation Act. In such a case, no doubt, it has been decided that the plaintiff having no independent cause of action cannot have an extended period of limitation by reason of his own disability. If an alienation is made, say in 1920, the then reversioner's suit would, if he was an adult, be barred in 1932 and the person who then became the nearest reversioner, must file the suit before 1932 even if he himself were a minor. But that is quite a different case. What is urged by the respondents is that even the period available to the then reversioner is somehow cut down merely because the suit is not by the person who was then the nearest reversioner but by one who has since become the nearest reversioner.

I can see no reason for this process of cutting down in any of the authorities brought to my notice, nor do I find any basis for it in the Indian Limitation Act. The starting point under column 3 of article 125 of the second schedule is "the date of the alienation." The plaintiffs being minors are *prima facie* entitled to the benefit of section 6 of the Limitation Act. But then it is said that on the authority of the Full Bench decision of this Court in *Varamma* v. *Gopaladasayya*[1], there is only one cause of action for the entire body of the reversioners and that a suit filed by a person who becomes the nearest reversioner after the alienation has no independent cause of action and must sue before the expiry of the time available to the reversioner who was in existence at the time of the alienation. In all the cases cited before me, the suit by the nearest reversioner in existence on the date of the alienation had become barred. By the death of that person another person became the reversioner and he filed the suit within six or twelve years from the time when he became the reversioner (as in *Varamma* v. *Gopaladasayya*[1]) or within three years after his attaining majority.

In *Ranodip Sing* v. *Parameshwar Pershad*[2], the father of the four plaintiffs effected an alienation in 1893 and at that time only the first two plaintiffs had been born. The third and fourth plaintiffs were born later in 1897 and 1900. The suit was filed on 23rd June, 1920. The Judicial Committee pointed out that if the suit was brought by the first three plaintiffs, the suit would be barred. It was contended that the minority of the fourth plaintiff saved the suit from being barred. Their Lordships said,

> "The cause of action arose in 1893 and it is from that date that the period of limitation is to be reckoned. The fourth plaintiff's subsequent birth on the 30th November, 1900, did not create a fresh cause of action or a new starting point from which limitation is to be reckoned."

If in the above case the first two sons who were alive in 1893 died after 1897, when the third son was born and the suit was filed before the expiry of the period available to the first two sons, the suit would not be held to be barred. At any rate, this decision does not deal with that contingency.

Strong reliance was placed on a decision of Madhavan Nair, J., in *Udayamuthier* v. *Shunmugam Chettiar*[3]. There the father alienated certain properties in 1900, 1903, and 1904. There was one son then in existence who was born in 1898. Another son was born in 1906. The elder son died minor in 1911. The suit was instituted in 1926. The learned Judge held that the suit was barred. Here again it would be seen that the first son would have had, if alive, time till 1919 to file the suit. The suit was not filed within that time but only in 1926, *i.e.*, within the three years after the later-born son attained majority. The same remarks as to the decision in *Ranodip Singh* v. *Parameshwar Pershad*[2] apply to this case also.

In *Dhanraj Rai* v. *Ram Naresh Rai*[4], the suit was brought by a subsequent-born son to set aside an alienation made before his birth. The alienation was in 1904 and at that time there was one Sitaram a minor who died in 1912 when he was thirteen years of age. The suit was filed in August, 1920. Daniels, J., said this,

> "If Sitaram had lived he would have attained majority in 1917. If that date is material, which I do think it is it would be for the plaintiffs to show that their suit was within three years of it. The suit was not filed till August, 1920."

---

1. (1918) 35 M.L.J. 57 : I.L.R. 41 Mad. 659 (F.B.).
2. (1924) 48 M.L.J. 29 : L.R. 52 I.A. 69 : I.L.R. 47 All. 165 (P.C.).
3. (1934) 41 L.W. 610.
4. (1924) 79 I.C. 1019.

As the plaintiffs did not show that Sitaram was born after August, 1899, in which case alone he would have attained majority after August, 1917 (if he had been alive), the suit filed in August, 1920, was held to be barred. The learned Judge expressly stated that the suit would have been in time if it had been filed within three years from the date when Sitaram, if alive, would have attained majority. The alienation was in 1904 and twelve years would expire in 1916. The learned Judge did not hold that that was the terminus but three years from the date when Sitaram would have attained majority.

The point is put beyond all doubt by Din Mohammed, J., in two decisions both reported in 18 Lahore. In the first of the cases, *Gobind* v. *Ram Lal*[1], the learned Judge states thus as point 3,

"In determining the period of limitation available to an after-born son, he cannot be deprived of the privileges enjoyed by the person on whose account he derives his right to sue. In other words, if the existence of a reversioner clothes an after-born reversioner with a right to sue, though an after-born reversioner cannot claim the benefit of section 6 of the Limitation Act in his own right, he cannot be deprived of the benefit of the extended period claimable by a reversioner in existence at the time of the alienation."

In the next case, *Harnam Singh* v. *Aziz*[2], the same proposition is laid down at page 776.

I adopt this proposition of Din Mohamed, J., as laying down the correct law and hold that the suit is not barred.

The respondents' learned counsel argued that the mortgage was supported by necessity but there is no substance in that contention.

I reverse the decrees of both the lower Courts and grant a decree as prayed for with costs in all the Courts.

Leave refused.

B.V.V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BYERS.

D. K. Aswatha Narayana Gupta .. *Petitioner** (*Complainant*)

v.

J. Muneppa and others .. *Respondents* (*Accused*).

Criminal Procedure Code (V of 1898), section 522—Scope and applicability—"Criminal force"—Construction.

The expression "criminal force" in section 522 of the Criminal Procedure Code does not embrace all kinds of physical violence on persons or inanimate objects but refers only to criminal force in the limited sense in which it is defined in the Penal Code and the section applies only to criminal force used against the person. Accordingly no order for restoration of possession can be made under section 522, Criminal Procedure Code where the criminal force attending the dispossession complained of is used not against the person dispossessed but against the property in his absence.

Roda v. *Autar Singh*, A.I.R. 1938 Lah. 839, not approved.

Ramchand v. *Emperor*, (1938) I.L.R. (1939) Lah. 513; *Narain Singh* v. *Ramlal*, A.I.R. 1940 Lah. 460; *Sadasib Mandal* v. *Emperor*, (1913) 26 I.C. 168 and *Daw Mya* v. *Emperor*, A.I.R. 1937 Rang. 248, relied on.

Petition under sections 435 and 439 of the Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of the Sub-Divisional First Class Magistrate of Anantapur, dated 16th January, 1942, and made in M. C. No. 6 of 1942.

S. Krishnamurthi for the Petitioner.

P. S. Narayanaswami Iyer for *A. Gopalacharlu* and *S. Narasimha Ayyangar* for the Respondents.

A. S. Sivakaminathan for the Public Prosecutor for the Crown.

The Court made the following

ORDER.—The only question which arises in this case is whether an order for restoration of possession can be made under section 522 of the Code of Criminal Procedure where the criminal force attending the dispossession complained of is used not against the person dispossessed but against the property in his absence.

---

1. (1937) I.L.R. 18 Lah. 395.
2. (1937) I.L.R. 18 Lah. 769.

* Crl. R. C. No. 363 of 1942. 21st December, 1942.
(Crl. R. P. No. 353 of 1942.)

The petitioner relies on the decision in *Roda* v. *Autar Singh*[1], as authority for his contention that the words " criminal force " used in section 522 of the Code are not limited to criminal force against a person but are wide enough to include criminal force against the property, such as breaking open the locks on the doors of a house, as in the present case. Skemp, J., took the view that as the definitions in sections 349 and 350, Indian Penal Code, consider force and criminal force only in their application to a person and say nothing about force as applied to a thing, the demolition of a wall or the breaking of a lock involved the use of criminal force. He held that the force used in such cases was criminal force because it involved the offence of mischief and that an order for restoration of possession based on the use of force of this kind would be competent.

On the other hand, several cases have been cited in support of the opposite view. The most recent appears to be the decision of Din Mohamed, J., in *Ramchand* v. *Emperor*[2] that section 522 contemplates only criminal force to the person. He based his conclusion largely on the reference in the section to criminal intimidation his view being that as an inanimate object cannot be criminally intimidated, it seemed reasonable to hold that the object of the criminal force also could only be a person and not property. This view was upheld and the opinion expressed by Skemp, J., dissented from by the Bench of two Judges in *Narain Singh* v. *Ramlal*[3].

In the case of *Sadasib Mandal* v. *Emperor*[4], a Bench of two Judges held that an order under section 522 of the Code of Criminal Procedure could not be made where the force used was not to any individual. Reference has also been made to a decision by the same Bench in *Bisweswar Singh* v. *Bholanath Pathuk*[5], a few months earlier but a perusal of the judgment shows that the point was not considered at all and that the headnote in the report is misleading. In *Daw Mya* v. *Emperor*[6], Mackney, J., held that it was necessary to show that the dispossession had been caused by criminal force shown to the owner or occupier of the property.

Although the definition of criminal force in section 350, Indian Penal Code, contemplates the use of force only to a person the words " criminal force " have long been understood to refer only to force as used against a person and not against a thing. The words " criminal force " have never been understood as denoting an offence involving the use of physical force against property, such as house-breaking, mischief, etc.

Although on a literal construction these words would seem to include acts of physical violence against property, they have acquired the specialised and limited meaning given them in all but one of the decisions referred to. According to section 4 (2) of the Code of Criminal Procedure, expressions not defined therein have the meanings attributed to them in the Indian Penal Code. It follows that the expression " criminal force " used in section 522 of the Code of Criminal Procedure does not embrace all kinds of physical violence on persons or inanimate objects but refers only to criminal force in the limited sense in which it is defined in the Penal Code. Although there is much to be said for the view that there is no difference in principle between dispossession by effecting a forcible entrance in the absence of the owner and dispossession of the owner himself by the use of force to him, I must hold that the section applies only to criminal force used against the person.

The order of the learned Magistrate is therefore correct and the revision petition is dismissed.

K.S. *Petition dismissed.*

---

1. A.I.R. 1938 Lah. 839.
2. I.L.R. (1939) Lah. 513.
3. A.I.R. 1940 Lah. 460.
4. (1913) 26 I.C. 168.
5. (1913) 22 I.C. 751.
6. A.I.R. 1937 Rang. 248.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

Ratnaswami Goundan .. *Appellant** (*Surety-Respondent*)

v.

P. S. A. R. A. R. Arunachalam Chettiar by Agent Sivaraman Chettiar .. *Respondent* (*Petr.-Plff.*).

Civil Procedure Code (V of 1908), section 55 (4)—Surety bond for prosecution of petition for adjudication and presence when required—Surety's liability—Surety not liable for anything outside the terms of the bond.

Section 55 (4), Civil Procedure Code, requires the due prosecution of a petition for adjudication as an insolvent of a judgment-debtor and his presence in Court when required. Where a surety bond executed under section 55 (4) merely required the judgment-debtor to present the petition for insolvency and regularly and properly conduct the proceedings thereon, there is no further liability on the part of the surety when there happens to be a failure on the insolvent's part to apply for discharge.

Case-law reviewed.

Appeal against the order of the District Court of Coimbatore, dated 22nd August, 1941, and made in Civil Appeal No. 50 of 1941, preferred against the order of the Court of the District Munsiff of Tirupur, dated 16th December, 1940, and made in E. P. R. No. 1257 of 1939 in O. S. No. 1914 of 1923.

K. S. Desikan for Appellant.

A. C. Sampath Aiyangar for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—The appellant executed a surety bond in favour of the respondent, who obtained a money decree against one Venkatachala Goundan. The question which the Court has to decide is whether the decree-holder is entitled to execute the decree against the appellant as the surety of the judgment-debtor. The judgment-debtor was arrested in the execution of the decree on the 22nd April, 1927 and thereupon notified the Court of his intention of applying for adjudication in insolvency. The judgment-debtor was released from arrest on the condition that he furnished a security bond for his due appearance in the insolvency proceedings and when called upon in the executing Court. There were two sureties, the appellant and one Ponnambala Goundan, who is not a party to these proceedings. Within the time allowed by section 55 (4) of the Civil Procedure Code, the judgment-debtor applied for an order under the Provincial Insolvency Act adjudicating him an insolvent. The order of adjudication was passed on the 21st November, 1927. It provided that the insolvent should apply for his discharge within one year. The insolvent did not apply for his discharge within the period fixed by the Court and on the 5th February, 1935, in an application filed by the decree-holder under section 43 of the Provincial Insolvency Act, the adjudication was annulled. Thereupon the decree-holder instituted fresh proceedings in execution of his decree against the appellant. The District Munsiff held that the decree-holder was entitled to execute the decree against the appellant and his decision was concurred in by the Additional District Judge of Coimbatore on appeal. The present appeal is from the order of the Additional District Judge. The case has been placed before a Bench as there are decisions of Judges of this Court, sitting alone, which are in conflict.

Section 55 (4), Civil Procedure Code. states that where a judgment-debtor expresses his intention to apply to be declared an insolvent and furnishes security to the satisfaction of the Court that he will within one month so apply and that he will appear when called upon in any proceedings upon the application or upon the decree in execution of which he was arrested, the Court may release him from arrest, and, if he fails so to apply or to appear, the Court may either direct the security to be realised or commit him to the civil prison in execution of the decree. It will be observed that the sub-section contemplates security for the judgment-debtor's appearance upon the application for adjudication and before the execution Court whenever required.

---

*A. A. A. O. No. 366 of 1941. 14th December, 1942.

The operative part of the surety bond in this case reads as follows :

> "We declare that the abovesaid defendant will file the insolvency petition within the thirty days' time ; that the said defendant will present himself at any time as the Court may direct that after filing the insolvency petition as aforesaid, he will present himself before Court for every hearing and conduct the above proceedings, regularly and properly, that in the event of failure to file the insolvency petition within the thirty days' time or if after filing the petition there is a failure in conducting the above proceedings, or if we fail to produce him before the Court at any time that the Court may direct or even if we fail to fulfil any of the conditions mentioned herein, we undertake to pay the entire amount determined as payable under the decree in the above suit."

The words " above proceedings " have reference to the insolvency petition and therefore the sureties guaranteed that the judgment-debtor would appear at every hearing of the petition and conduct the proceedings " regularly and properly." The section and the bond contemplate the due prosecution of the application for adjudication ; but even when granted, the Insolvency Court could require his appearance in the application. Nothing is said in section 55 (4) or in the bond with regard to the filing of an application for discharge. The surety bond must be construed strictly and therefore the sureties cannot be made liable for anything which does not fall within the terms of the bond.

The decisions which are in conflict are on the one hand the judgment of Cornish, J., in *Karuppanna Goundar* v. *Chidambaram Chettiar*[1] and on the other the judgment of Curgenven, J., in the unreported case of *Abi Bunisa Ammal* v. *Mohamad Kasim Rowther*[2] and the judgment of King, J., in another unreported case, *Rangappa Naicker* v. *Sri Sowdambigai Nidhi, Ltd.*[3] The opinion expressed by Cornish, J., which was on a bond in terms apparently analogous to the bond in this case was that the surety could not be held liable because the judgment-debtor had failed to apply for his discharge as an insolvent. In that case the surety undertook that the judgment-debtor would prosecute his petition for adjudication to " its very end." The learned Judge considered that this meant that the debtor was to prosecute the petition until its termination which might be its dismissal by the Court under section 25 or adjudication by the Court under section 27, these being the only two ends for the debtor's insolvency petition. We have not before us the whole of the terms of the bond in that case and it may not have provided as the bond in the present case does, for the appearance of the insolvent on the petition at any time when required by the Court ; but in any event we agree that it could not be construed as requiring the surety to ensure that the insolvent would apply for his discharge. In *Abi Bunisa Ammal* v. *Mohamad Kasim Rowther*[2], Curgenven, J., considered that the expression which was used in the bond in that case—" does not properly conduct proceedings after filing the insolvency petition "—must be held to include the failure of the insolvent to apply for his discharge because that involved a failure to prosecute the case with due diligence. This opinion was shared by King, J., in *Rangappa Naicker* v. *Sri Sowdambigai Nidhi, Ltd.*[3] Each case must be decided on the wording of the bond concerned, but we are unable to agree that where the bond merely requires the judgment-debtor to present the petition for insolvency and regularly and properly conduct the proceedings thereon there is any liability on the part of the surety when there happens to be a failure on the insolvent's part to apply for his discharge. As we have pointed out, section 55 (4) requires the due prosecution of the petition for adjudication and his appearance when required. It is not suggested in the present case that the judgment-debtor did not appear in the Insolvency Court whenever required or that he failed to appear in the executing Court when required. In the circumstances the appellant cannot be held liable on this bond.

The appeal will be allowed with costs here and in the Courts below.

K.C. *Appeal allowed.*

---

1. (1936) 71 M.L.J. 646.
2. A.A.A.O. No. 107 of 1929.
3. A.A.A.O. No. 112 of 1938.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KING.

Thottoli Meethale Vittil Kaitheri Sreedevi Akkamma.. *Appellant** (*Respondent*)

v.

Murichandiyil Aniyapravan Kunhammad Haji and others .. *Respondents* (*Petitioners*).

Madras Agriculturists' Relief Act (IV of 1938), section 15—Application for scaling down—Landlord and tenant—Decree to evict—Decree granting payment of arrears—Amount of compensation to tenant to be set off against arrears of rent—Payment effective only when actual balance is paid.

Where a landlord obtained a decree to evict his tenant and the decree declared that a certain sum was due to the tenant by way of compensation for improvements and also gave a set-off of rent due by the tenant to the landlord,

Held, that the mere existence of a decree granting a right to the landlord to set off arrears of rent against the compensation for improvements payable to the tenant was not equivalent to the payment of those arrears. The payment of rent cannot be effected until payment has actually been made by the landlord of the compensation for improvements less the sum due to him for arrears of rent. Until that payment was made neither party should be deemed to have made any payment of any kind to the other.

Held, further, that an application under the circumstances by the tenant under section 15 of the Madras Act IV of 1938 depositing the rent due on the holding for faslis 1346 and 1347 for an order that the arrears of rent due for previous faslis should be regarded as discharged will be justified.

Appeal against the order of the District Court of North Malabar, dated 8th January, 1941 and passed in A. S. No. 104 of 1940, preferred against the order of the Court of the District Munsiff of Nadapuram, in O. P. No. 159 of 1939, etc.

K. Kuttikrishna Menon for Appellant.

O. T. G. Nambiar for Respondents.

The Court delivered the following

JUDGMENT.—The appellant in these appeals is a landlord in North Malabar who had obtained a decree to evict his tenant in 1932. The decree declared that a certain sum was due to the tenant by way of compensation for improvements and also gave a set-off of rent due by the tenants to the landlord. Up till the date of the applications with which I am concerned the decree had not been executed, though in 1936 the landlord applied to execute the decree and his application had calculated the amount of rent due up to that time for which he claimed a set-off as against the amount payable as compensation for improvements. However the execution application was not pressed and was eventually dismissed. After the passing of the Madras Agriculturists' Debt Relief Act, two applications were made by the tenant under section 15. He deposited the rent due on his holding for faslis 1346 and 1347 and applied for an order that the arrears of rent due for previous faslis should be regarded as discharged. Orders were passed in his favour by both the learned District Munsiff of Nadapuram and the learned District Judge of North Malabar in appeal. These are second appeals against those orders.

Since these appeals were filed, it has been held by this Court that no appeal lies against such an order. A preliminary objection therefore that these appeals do not lie must be upheld. But I have been asked to treat the appeals as civil revision petitions under section 115, Civil Procedure Code. *Prima facie* it seems to me that section 115, Civil Procedure Code, will not apply to the circumstances of this case ; but inasmuch as a liberal view of section 115, Civil Procedure Code, has always been taken by this Court in matters affecting the interpretation of the Debt Relief Act, I have heard the appeals on their merits as if they fell within section 115, Civil Procedure Code.

The argument for the appellant is that because he has declared in his execution application in 1936 that he is demanding a set-off for the arrears of rent due up to that date those arrears of rent must be deemed to have been paid at the time when the demand was made. The view taken by the Courts below on the other hand is that no such payment can possibly be effected until the balance due to the tenants as compensation for improvements has actually been paid. There is no direct

*A. A. A. Os. Nos. 283 and 284 of 1941. 10th December, 1942.

authority on either side which deals with all facts similar to those which are before me; but the general principle has been enunciated that the mere existence of a decree granting the right to the landlord to set-off the arrears of rent is not equivalent to the payment of those arrears. It seems to me that an ineffective execution application and the recitals of that application cannot materially alter this situation. The payment of rent cannot, I think, be effected until payment has actually been made by the landlord of the compensation for improvements less the sum due to him for arrears of rent. Until that payment has been made it seems clear to me that neither party has made any payment of any kind to the other. I am of opinion, therefore, that the view taken by the Courts below is correct and that these appeals must be dismissed with costs of respondents 1 to 3. The costs will be in one appeal only.

K.C. ——— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BYERS.

Juje D'Silva .. *Petitioner**

v.

Kashmir D'Silva .. *Respondent (Counter-petitioner).*

Criminal Procedure Code (V of 1898), sections 133 and 137 (3)—Magistrate if can modify provisional order made under section 133 while making it absolute under section 137.

Where a preliminary order issued under section 133 of the Criminal Procedure Code called upon the owner of a tree to show cause why he should not be directed to take certain steps to prevent it from damaging a house close by and the notice contemplated either cutting it or securing it with a wire, the Magistrate has no power to order the owner under section 137 of the Criminal Procedure Code to cut the tree, giving him no option to secure it with wires. The Magistrate sitting alone and disposing of the matter under section 137 has no jurisdiction to modify the original order. It is only when sitting with a jury and passing a final order under section 139 that he has power to modify the order originally made.

Case referred for the orders of the High Court, under section 438 of the Criminal Procedure Code, by the District Magistrate of South Kanara in his letter, dated 3rd December, 1942.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

Petitioner and Respondent not represented.

The Court delivered the following

JUDGMENT.—The case which has given rise to this reference arose under section 133 of the Code of Criminal Procedure. By a preliminary order issued under that section the owner of two trees was called upon to show cause why he should not be directed to take certain steps to prevent them from damaging a house close by. One of the trees is a cocoanut tree and the notice issued under section 133 of the Code contemplated either cutting it or securing it with a wire. Eventually, the Stationary Sub-Magistrate ordered the respondent in the proceedings to cut the tree, giving him no option to secure it with wires as he found that this remedy would not serve the purpose on account of the heavy winds prevailing at certain times of the year. The reference has arisen on the contention that it was beyond the power of the learned Magistrate to modify the provisional order.

The order has been made absolute under section 137 (3) of the Code, which directs that if the Magistrate is not satisfied that the order is not reasonable and proper, "the order shall be made absolute." Under section 135 of the Code the respondent in the proceedings may apply for a jury to try the issue whether the order is reasonable and proper. In such a case the final order is passed under section 139 of the Code, which confers jurisdiction upon the Magistrate to make the order absolute subject to any modification found necessary. Thus it will be seen that when the Magistrate sitting alone disposes of the matter under section 137, he has no jurisdiction to modify the original order. It is only when sitting with a jury that he has power to modify the order before making it absolute.

---

*Crl.R.C. No. 784 of 1942. 15th January, 1943.
(Case Referred No. 59 of 1942).

In the result, the reference is accepted and the final order will include the alternative provision of securing the tree with a wire as contemplated by the order first issued under section 133 of the Code.

K.S. — *Reference accepted.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KING.

Dharmasamarajayya .. *Appellant** (*3rd Defendant*)

v.

Sankamma and others .. *Respondents* (*Plffs.-Defts.*).

Provincial Insolvency Act (V of 1920)—Gift by N *to his wife—Adjudication of* N *as insolvent—Gift set aside at the instance of Official Receiver—Annulment of adjudication—Subsequent will disposing of the property—Annulment of adjudication revives gift.*

In 1926, *N* made a gift in favour of his wife of certain properties. In October, 1926, *N* was adjudicated an insolvent and in March, 1927, the gift deed was set aside. In March, 1928, the adjudication was annulled. It had not been necessary for the Official Receiver to dispose of the property dealt with by the gift deed. *N* executed a will on 11th August, 1927, in which he assumed that as the gift deed had been set aside the property had reverted to himself and bequeathed the properties to his wife and after her death to their three daughters. After *N's* death his widow granted a permanent lease of the lands and one of the daughters sued for a declaration that the lease was not valid beyond the lifetime of the widow. On the question whether the property of *N* passed under the gift or under the will,

Held, the annulment of the gift by the Insolvency Court was solely in the interests of the insolvent's creditors and to the extent that those interests did not require the annulment, the annulment was automatically cancelled by the annulment of the adjudication and the conclusion of the insolvency proceedings.

In re *Parry*: Ex parte *Salaman,* (1904) 1 K.B. 129, applied.

The rights under the gift deed were therefore automatically restored by the annulment of the adjudication.

Appeal against the decree of the Court of the Subordinate Judge of South Kanara, dated 18th August, 1941 and passed in A. S. No. 70 of 1941 (A.S. No. 435 of 1940 on the file of the District Court, South Kanara) preferred against the decree of the Court of the District Munsif of Karkal in O. S. No. 307 of 1939.

B. Sitarama Rao and *M. K. Devaraj* for Appellant.

K. Y. Adiga for Respondents.

The Court delivered the following

JUDGMENT.—The appellant here is the 3rd defendant in the Court of the District Munsiff of Karkal. He was a lessee of certain properties under a permanent lease from the first defendant. The first defendant was the widow of one Nagaraja Shetty. In 1926 Nagaraja Shetty made a gift (Ex. II) in favour of his wife, the first defendant, of the properties now in suit. In October, 1926, he was adjudicated insolvent and in March, 1927, the gift deed was set aside. In March, 1928, the adjudication was annulled. Although the gift deed had been set aside it had not been necessary for the Official Receiver to dispose of the property which was dealt with by the gift deed. Between these dates Nagaraja Shetty executed a will on the 11th August, 1927. In that will he assumed that as the gift deed had been set aside the property had reverted to himself and he could dispose of it. He bequeathed it to his wife and after his wife's death to their three daughters. The suit was filed in the Munsiff's Court by the first plaintiff, one daughter of Nagaraja Shetty, and other plaintiffs who are the daughters of another daughter, for a declaration that the permanent lease given by the first defendant to the third defendant was not valid beyond the lifetime of the first defendant. The suit has been decreed by the learned District Munsiff and the District Munsiff's decree has been confirmed by the learned Subordinate Judge of South Kanara and the third defendant now appeals to this Court.

The first point which requires discussion is whether the property passes under the gift deed Ex. II or under the will. It seems to me that, as argued for the

*S. A. No. 1333 of 1941. 27th November, 1942.

appellant, it must be the gift deed which is here the effective document. No doubt that gift deed was set aside in 1927, but it was set aside not in the interests of the insolvent as a person but in the interests of the insolvent's creditors represented by the Official Receiver. As it was unnecessary to dispose of the property covered by Ex. II in order to meet the claims of the insolvent's creditors it seems to me that the effect of the annulment of Ex. II must automatically disappear at the conclusion of the insolvency proceedings. It is true that there is no specific provision in the Provincial Insolvency Act to deal with this rather unusual situation and it was argued by the Subordinate Judge that under section 37, the setting aside of the sale deed was confirmed finally. I am not prepared to hold this. It seems to me that in accordance with the principle of the law in England as referred to in In re *Parry*: Ex parte *Salaman*[1], the annulment of an alienation of this kind is solely in the interests of an insolvent's creditors, and to the extent that those interests do not require the annulment, the annulment is automatically cancelled. I would hold therefore that from March, 1928, onwards any rights which had accrued under Ex. II are automatically restored, and this appeal must be decided upon an examination of the gift deed, Ex. II.

On the question of the interpretation of Ex. II the learned District Munsiff held that it conferred a life estate upon the first defendant and an absolute estate after her death upon her three daughters Padmavathi, Sankamma and Shivadevi. The learned Subordinate Judge took the opposite view that it conferred an absolute estate on the first defendant and that that absolute estate could not be defeated by a subsequent reference to the fact that the three daughters would be succeeding their mother on her death. It seems to me that of these views that of the District Munsiff should prevail. The District Munsiff points out the contrast between the language in which the rights of the first defendant are mentioned and that in which the rights of the three daughters are mentioned later in the document. The donor says :

"I have hereby now delivered possession of the undermentioned properties to you as gift subject to the condition set out below" ;

and near the conclusion of the document he says:

"After your death your daughters Padmavathi, Sankamma and Shivadevi, these three individuals alone shall be the absolute huqdars to enjoy the said properties."

In the first instance there is a reference to conditions. In the second instance there is the use of the word 'absolute'. The learned Subordinate Judge refers to several other clauses in the document all of which seem to me to be inconclusive. The donor takes pains to say that now that he is giving his property he himself has no interest in it and he himself will not interfere with any manner in which it may be enjoyed. That is in my opinion quite inconclusive. The manner in which the first defendant is to enjoy the property is thus stated :

"Henceforth in the matter of your enjoying the same, effecting improvements as you please, paying theerva with entry in the patta in your name and continuing to 'prosper' as you please."

These are all indications of a permanent association between the first defendant and the property. It would have been easy for the donor in this context to have inserted some reference to mortgage or other form of alienation but every word he uses presupposes that the first defendant shall continue to enjoy the property in the ordinary sense of the term by remaining its owner throughout her life. The learned Judge seems to think that because the first defendant is enjoined by the donor to pay his debts and because it is possible that these debts could not be paid except by the alienation of part of the property, therefore, the estate given to her must be absolute. But I cannot see how this logically follows. Whether the donor had intended to give an absolute estate to his wife or a life estate to his wife followed by an absolute estate to his daughters, if the debts were so large that they could not be met without the alienation of part of this estate, that part would have to be alienated whatever his intentions might have been. The mere fact of the existence of debts and the failure by the donor to indicate as to who exactly should have power to

1. (1904) 1 K.B. 129.

dispose of the estate seems quite inconclusive. No doubt it is in favour of the third defendant's contention that Ex. II is a document actually executed only in favour of the first defendant. The first defendant's daughters are not actually made parties to the document; but it seems to me that when the document is read as a whole it is more likely that the intention of the donor was that the property should remain with his wife only for her lifetime and then go to his daughters, than that he contemplated any kind of absolute disposal of the property in favour of his wife. I am inclined to think that if there is any ambiguity in the construction of Ex. II that ambiguity will be finally resolved by a consideration of the will which was executed by Nagaraja Shetty about a year later. There can be no doubt whatever from the language of the will that Nagaraja Shetty was bequeathing his property to his wife for her lifetime and to his daughters after her death. It seems to me very unlikely that Nagaraja Shetty would have any different views on the question of the disposition of his property at the time when he made the gift in 1926 and at the time when he executed his will in 1927. The fact therefore that by his will he gave only a life estate to his wife is an almost convincing indication that in 1926 by the gift deed he intended that his wife should take only a life interest.

I am accordingly of opinion that the decision of the lower Courts is correct that the interest acquired by the first defendant was only for her lifetime and therefore that she had power to lease the property to the third defendant only for a term which coincides with her life. The decrees of the Courts below are therefore correct and this appeal is dismissed with costs.

K.S. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MOCKETT.

Peddiboyima Viswanatham and others .. *Petitioners** (*Petitioners*)

v.

Sreemat Kilambi Srinivasa Venkata Varadacharyulu Ayyavarlam Garu .. *Respondent* (*Respondent*).

Civil Procedure Code (V of 1908), section 115—Scope.

Section 115 of the Code of Civil Procedure does not apply to an order of a lower Court refusing to grant a review of its decision as no question of jurisdiction arises, the lower Court having complete jurisdiction to decide whether it should or should not review its order, and also because the petitioner could have appealed against the judgment in the suit.

Ram Lal v. *Ratanlal*, (1904) I.L.R. 26 All. 572 and *Lakshman Maruti Jadhav* v. *Maruti Lakshman Teli*, (1924) 26 Bom. L.R. 284, approved.

Petitions under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the orders of the Court of the District Munsiff of Gudiwada, dated 5th September, 1941 in C. M. P. No. 785 of 1941 in O. S. No. 294 of 1940, in C. M. P. No. 786 of 1941 in O. S. No. 311 of 1940 and in C. M. P. No. 787 in O. S. No. 312 of 1940 respectively.

Y. G. Krishnamurthi for Petitioners.

K. Kameswara Rao for Respondent.

The Court delivered the following

JUDGMENT.—The petitioners are the defendants in O. S. Nos. 294, 311 and 312 of 1940 in the Court of the District Munsiff of Gudiwada; the plaintiff-respondent is the landholder. He brought these suits for rent; and he also brought a suit, O. S. No. 268 of 1940, against another tenant who is not before me. The defence was that the Court had no jurisdiction because the land concerned was an estate within the Madras Estates Land Act and therefore only the Revenue Court could try the suit. On the 3rd July, 1941, it was held that the Court had jurisdiction and that the property concerned was not an estate. No appeal was filed against this order. On the 13th September, 1941, O. S. No. 268 of 1940, was decided by the same Munsiff in which he held that a similar property was an estate. An

*C. R. Ps. Nos. 252, 253 and 254 of 1942. 20th November, 1942.

application was filed before the learned District Munsiff who had decided O. S. Nos. 294, 311 and 312 of 1940 to review his judgment and order in these suits. He refused to do so stating quite correctly that there was no error apparent on the face of the record. These are petitions under section 115, Civil Procedure Code, seeking to revise that order.

I respectfully agree with the decisions of the Bench of Allahabad High Court in *Ramlal* v. *Ratanlal*[1] and of the Bombay High Court in *Lakshmana Maruti Jadhav* v. *Maruti Lakshman Teli*[2] who have dealt with the question whether section 115, Civil Procedure Code, applies to an order of a lower Court refusing to grant a review of its decision. Both the Benches have held that it does not. The petitioners could have appealed against the judgment in the three suits. Ordinarily section 115, Civil Procedure Code, is not invoked when a remedy is available by means of an appeal. I respectfully agree that no question of jurisdiction can possibly arise, the learned Judge having complete jurisdiction to decide whether he should or should not review his order. Apart from this, I do not consider these petitions have any merits. It is obvious that the petitioners were ready to abide by the decisions in the earlier suits ; but when they heard that the learned District Munsiff had taken another view in the later suit they were anxious to see what further good fortune awaited them in the Courts. I do not think that they are entitled, now that they have allowed their remedy by way of appeal to lapse, to invoke this Court's discretionary powers in their favour by the circuitous method of a civil revision petition against an order refusing to review the judgment against which they preferred not to appeal.

The three civil revision petitions are dismissed with costs, three sets, as the petitioners are different in each.

K.S. —————— *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ABDUR RAHMAN.

M. P. Krishnaswami Pillai .. *Appellant** (*7th Defendant-5th Respt.*)

v.

Chockalingam Chettiar and others .. *Respondents* (*Plff.-Defts. Applt.-Respt.*).

Civil Procedure Code (*V of 1908*), *Order 34, rule 12—Preliminary decree—Form of—Consent of prior mortgagee to a decree for sale of property by puisne mortgagee—Decree whether in order.*

On the question in what form a preliminary decree in a suit for sale brought by a puisne mortgagee should be passed when the prior mortgagee was impleaded as a party to the action and was willing to have the property sold free from his encumbrance on condition that he should be paid first from out of the sale proceeds,

Held, that a preliminary decree incorporating the condition could be passed with the consent of the prior mortgagee preceding the decree for sale. Rule 12 of Order 34, Civil Procedure Code, does not prohibit the Court from passing such orders as appear necessary in the circumstances.

Venkatesa Aiyangar v. *Manikkavachakam Chetty*, (1935) 68 M.L.J. 738, explained and dissented from.

Appeal against the decree of the District Court of Trichinopoly in A. S. No. 112 of 1940, preferred against the decree of the Court of the District Munsiff of Kulitalai in O. S. No. 99 of 1939.

S. Ramaswami Aiyar for Appellant.

A. V. Narayanaswami Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—The only question that awaits to be determined in this appeal relates to the form in which a preliminary decree in a suit for sale brought by a puisne mortgagee should be passed when the prior mortgagee was impleaded as a party to the action and was willing to have the property sold free from his incumbrance on the condition that he should be paid first out of the proceeds of the property mortgaged with him. The trial Court passed such a decree but on appeal

1. (1904) I.L.R. 26 All. 572.
2. (1924) 26 Bom.L.R. 284.

*S. A. No. 263 of 1941. 16th November, 1942.

by the puisne mortgagee, the District Judge of Trichinopoly modified it and ordered the property to be sold subject to the prior incumbrance. He did so as he was of opinion that Order 34, rule 12, Civil Procedure Code, could be of no avail to the prior mortgagee, and that he could not, according to a decision of this Court reported in *Venkatesa Aiyangar* v. *Manikkavachakam Chetty*[1] make an application under that rule. The prior mortgagee, who figured as the 7th defendant in this litigation, appeals.

It might be mentioned at the outset that only one (the first) item of the property was mortgaged with the prior mortgagee while several other items were mortgaged with the plaintiff-respondent. The question to be decided is thus in respect of the first item alone. It might also be mentioned although it is not necessary for the decision of this case, that the first item was subsequently purchased by the 7th defendant in the name of his servant, the third defendant, on the 20th August, 1931, out of which a sum of Rs. 2,900 was to go towards the discharge of the first mortgage and the balance of Rs. 100 was paid in cash. The plaintiff (puisne mortgagee) and the 7th defendant had agreed on the 14th November, 1939, that the latter would be entitled to priority to the extent of Rs. 2,900 against item 1. The plea raised on behalf of the puisne mortgagee in regard to the application of the Agriculturists' Relief Act to the debt due to the 7th defendant was repelled by the trial Court and it was ordered that a sum of Rs. 2,900 be paid first to the 7th defendant from the sale proceeds of item 1. This was done as the 7th defendant had not only no objection to the entire property being sold but had himself at one stage of the case asked for that course to be adopted.

The assumption underlying the judgment of the learned District Judge that but for the provision contained in Order 34, rule 12 (even if it were construed in the manner in which he had), the decree of the lower Court could not be sustained is erroneous. The Civil Procedure Code is not exhaustive and unless there was a prohibition, the trial Court was fully entitled to make such orders and pass such decrees *ex debito justitiae*—even if not provided by the Code—as appeared to be necessary in the circumstances of the case. The principle underlying rule 12 is that the rights of a prior mortgagee could not be adversely affected and the property mortgaged with him could not be sold without his consent. The second condition of this rule is that the property must be such as to which an order for sale has been either given by a Court or is to be given. The rule does not provide, as I read it, that a decree for sale must necessarily have been passed before the date of the consent of the prior mortgagee. There can be no objection in my view in construing it in such a way as to take within it the consent of a prior mortgagee preceding the decree for sale. The decision in *Venkatesa Aiyangar* v. *Manikkavachakam Chetty*[1], referred to by the learned District Judge has no application to the facts of the present case. In that case a puisne mortgagee had brought a suit for the sale of the property, but after the decree had been passed his claim was satisfied by the mortgagor and it was held that in those circumstances the prior mortgagee, although a defendant in the suit, had no right under the terms of Order 34, rule 12 to ask the Court to sell the property in order to discharge the debt due to him. This was because the decree which contained a direction to sell the property had been satisfied and the direction could not but have been found to be exhausted. This is different from the present case. The decision in *Venkatesa Aiyangar* v. *Manikkavachakam Chetty*[1], although not on all fours, is more to the point. The provisions contained in the form of decrees, Appendix D, form 10 go to support my conclusion that the preliminary decree for the sale of the entire property was, in view of the consent of the prior mortgagee, more regular than that passed by the lower appellate Court. After all Order 34, Civil Procedure Code, does not relate to execution of decrees. It provides for the frame of the suit relating to mortgages, for the decrees, preliminary and final, to be passed in such suits and generally for the substantive rights of the mortgagees to be

1. (1935) 68 M.L.J. 738.

satisfied in respect of their debts out of their mortgage securities. These and other considerations of convenience as also the construction of rule 12 leave no doubt in my mind that the order passed by the lower appellate Court could not be sustained. I would for the above reasons set it aside.

This does not however dispose of the appeal. Another point was taken in the grounds of appeal by the respondent which became, in view of the decision by the learned District Judge, unnecessary to determine. Learned counsel for the appellant contended before me that that point must be taken to have been abandoned on behalf of the respondent. But I am not of that opinion. A ground of appeal was specifically raised on that point. If it was not pressed or abandoned, it should have been so stated very clearly in the judgment of the Court below. In all probability the other question was not discussed by the lower appellate Court as it was regarded to be unnecessary. If the sale was to be ordered as being subject to the first mortgage, as it was, the other question raised on behalf of the respondent did not call for a decision. Now that I am taking a different view and am of opinion that the decision of the first Court on that point was correct, the other question has to be considered and decided by the lower appellate Court. For the above reasons, I would accept the appeal, set aside the order of the lower appellate Court and send the case back to that Court for decision on the other point that had been raised on behalf of the respondent in the memorandum of appeal but was not considered and decided by the lower appellate Court.

The appellant will be entitled to his costs in this appeal. The costs of the lower appellate Court will be in the discretion of the learned District Judge.

Court-fee paid in the second appeal will be refunded to the appellant.

K.C. ——— *Case remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

PR. AL. M. Muthukaruppan Chettiar .. *Petitioner**

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

Income-tax Act (XI of 1922), section 66 (3)—Lease entered into by a firm—Loss incurred by the firm in the sub-leases by them—Entry of loss into books as business loss—For purposes of income-tax, the loss not to be included in the business.

Where a money-lending business firm of Chettiars entered into a lease of a building and the lessees intended to sub-let parts of the building and it happened that the expected indemnification by the sub-lessees in respect of any liabilities arising under the lease failed and resulted in a loss to the firm, but in the account books the loss was made out as business loss and on that footing a claim was made before the Income-tax Commissioner for a deduction in the computation of the profits of the business firm,

Held, that the lease was a transaction entirely outside the business of money-lending and such being the case the loss suffered could not be treated as a business loss but only as a capital loss. The fact that the assessee chose to write off the amount in the books kept by him in connection with his money-lending business does not make any difference.

Case stated under section 66 (3) of the Indian Income-tax Act, by the Commissioner of Income-tax, Madras, in pursuance of the High Court's Judgment and Order dated the 23rd February, 1942.

P. R. Srinivasan for the Petitioner.

K. V. Sesha Aiyangar for the Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—The assessee carried on a money-lending business in Rangoon in partnership with the S. P. K. A. firm. The firm composed of the assessee and the S. P. K. A. firm was known as the S. P. K. A. A. M. firm. On the 14th March, 1929, the S. P. K. A. A. M. firm and another Chettiar firm carrying on business in Rangoon, styled the O. N. R. M. M. firm, entered into a lease of a building in Mogul Street, Rangoon, at a rent of Rs. 3,000 per month. Chettiars carrying on business

*O. P. No. 261 of 1941. 19th October, 1942.

in Rangoon all had their offices in Mogul Street. The lessees did not require the whole of the premises for their respective businesses and their intention was to sub-let parts of the building to other Chettiars. This they did, but the sub-lessees did not pay in full what was due from them by way of rent. The lessees themselves disputed the validity of the lease with their landlord and the case was carried to the Privy Council. The Privy Council held that the lease was valid and therefore the lessees were responsible for the rent.

On the 2nd January, 1935, after the Judicial Committee had given its decision, the lessees entered into a compromise with their landlord under which the remainder of the term of the lease was to be cancelled and the lessees were to pay to him the sum of Rs. 1,98,650 by way of rent, compensation and damages. Each of the sub-lessees had agreed to pay a proportion of the rent and to reimburse and indemnify the lessees in respect of any liability arising under the lease. The S. P. K. A. A. M. firm paid the landlord the Rs. 1,98,650 between January, 1935 and June, 1936 and then dissolved.

In 1937, the assessee and the S. P. K. A. firm filed a suit in the Rangoon High Court against the sub-lessees and their co-lessee, the O. N. R. M. M. firm, to recover their proportions of the Rs. 1,98,650. The O. N. R. M. M. firm was in fact liable to the extent of one half. In the year of account (1937-38) the plaintiffs settled with some of the defendants and the settlements resulted in a loss of Rs. 45,424. The loss was apportioned between the S. P. K. A. firm and the assessee, and the assessee wrote off in his books the sum of Rs. 22,712, being half of the total loss. In addition he treated the sum of Rs. 1,335, spent in the litigation as business expenses.

The Income-tax authorities refused to recognise these sums as being legitimate deductions in calculating the amount of profits for that year. The assessee objected and asked the Commissioner of Income-tax to state a case. He refused to do so, but was directed by this Court to make this reference under section 66 (3) of the Indian Income-tax Act. The question referred reads as follows :—

> " Whether the petitioner was not entitled on the facts and in the circumstances of the case to claim a deduction of Rs. 22,712 and Rs. 1,335 in the computation of the profits of his Rangoon business as allowable business loss or bad debts properly written off and whether the disallowance of the claim by the Income-tax authorities as capital loss not connected with the petitioner's money-lending business was legal or supported by any materials on record."

The case has now been fully argued and we are of the opinion that the question should be answered against the assessee. The entering into a lease of a large building in Mogul Street was no part of the assessee's business as a money-lender. He and his partner entered into the lease in the hope that they would be able to recover from their sub-lessees most of the rent to be paid to the landlord. This was a transaction which was entirely outside the business of money-lending and this being the case the loss suffered could not be treated as a business loss. As it was not a business loss it could only be regarded as a capital loss. The fact that the assessee chose to write off the amount in the books kept by him in connection with his money-lending business does not make any difference.

The question referred will be answered accordingly. The assessee must pay the costs, Rs. 250.

K.C. — *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Mahabala Holla and another .. *Petitioners* (Petrs. 3 and 4)*

v.

The Canara Banking Corporation, Udipi, Limited, by agent, K. Vittal Bhandary and others .. *Respondents (Respts. and 2nd Petitioner).*

Madras Agriculturists' Relief Act (IV of 1938), section 10 (2) (iii)*—Liability to scheduled bank—Interest provided at less than nine per cent.—Renewal of previous debt carrying interest at higher rate—Application for scaling down—Sustainability.*

*C. R. P. No. 1461 of 1941. 14th October, 1942.

In deciding the question whether the liability to a scheduled Bank is one bearing interest at not more than nine per cent. per annum the Court has to look to the actual liability sought to be scaled down and cannot take into consideration any pre-existing liability, which only becomes relevant if and when it has been found that the provisions of Madras Act IV of 1938 have to be applied to the debt. Where there is a debt due to a scheduled Bank carrying interest at nine per cent. or less, which itself is a renewal of a pre-existing debt carrying interest at more than nine per cent. the Bank will be entitled to the protection of section 10 (2) (*iii*) of Madras Act IV of 1938.

Subramania Iyer v. *India Equitable Insurance Co.*, (1941) 2 M.L.J. 509, approved.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge of South Kanara, dated 22nd February, 1941, and made in R. I. A. No. 353 of 1938 in O. S. No. 39 of 1934.

K. Y. Adiga for Petitioners.

K. P. Sarvothama Rao for Respondents.

The Judgment of the Court was delivered by

Wadsworth, J.—This civil revision petition arises out of an application under section 19 of Madras Act IV of 1938 by defendants 3 and 5 to amend a decree based on an award. The contesting respondent is the Canara Banking Corporation, Udipi, Limited, which is a scheduled bank as defined by section 2 (*e*) of the Reserve Bank of India Act, 1934. The Bank advanced a series of loans to the defendants, the two loans with which we are primarily concerned being one of Rs. 37,285 on 20th June, 1931 and another of Rs. 1,165 advanced on 4th December, 1931. On the latter date the borrowers executed a security bond in favour of the bank mortgaging their properties as security for the whole of the amounts advanced. Thereafter there was a partition in the family of the debtors and some trouble arose concerning the proportionate liability of the different branches and of the property mortgaged which had come to be separately owned as a result of the partition. In October, 1933, a reference was made to an arbitrator who had to decide what were the facts regarding the partition, what was the liability of the different branches and of the different properties belonging to these branches and what was the rate of interest to which the bank was entitled, having regard to the terms of the borrowing that the loans should carry interest at one per cent. over the current rate of the Imperial Bank of India with a default rate of 12½ per cent. per annum. While the arbitration was proceeding the debtors offered certain properties as security in substitution for the properties affected by the partition and they also offered as additional security an usufructuary mortgage right over a property situated in the Bombay Presidency. The arbitrator, on 28th December, 1933, passed an award in which he calculated the amount due under the pre-existing contract, with its varying rates of interest and default rate for arrears as Rs. 47,835. He settled the extent of the liability of each branch of the family and directed payment by a certain date, failing which the full amount of Rs. 46,700 was to carry interest at 8¼ per cent. per annum till realization by sale of the properties set out in the schedules, which included part of the original security, the substituted security and the additional security situated in the Bombay Presidency. It is also provided that the award should be embodied in a decree which should be treated as a final decree. This award was embodied in a decree dated 25th September, 1934.

It was contended before the lower Court that the applicants were entitled to have this decree amended under Act IV of 1938 on the basis that the award was a renewal of the pre-existing liability which went back to a number of separate advances at different dates. This contention was met by two objections, firstly, that the contesting respondent was a scheduled bank and that the rate of interest did not exceed nine per cent. so that the transaction was protected by section 10 (2) (*iii*) of Act IV of 1938, and secondly that the award affects property outside the Madras Presidency which is not amenable to legislation passed by the Madras Provincial Legislature, and that the award as a whole must therefore be outside the scope of that legislation. The lower Court, relying on the decision in *Wahid-ud-din* v. *Makhan Lal*[1], gave effect to this latter contention and dismissed the petition. In the view

1. I.L.R. (1938) All. 781

which we take it is not necessary for us to go into the correctness of the decision of the lower Court on this part of the case. We are of opinion that on a correct view of the transaction the respondent is entitled to the protection of section 10 (2) (*iii*) of the Act. It was held by one of us in *Subramania Iyer* v. *India Equitable Insurance Co., Ltd.*[1], that where there was a debt due to a scheduled bank, carrying interest at nine per cent., which itself was a renewal of a pre-existing debt carrying interest at more than nine per cent. the bank was entitled to the protection of section 10 (2) (*iii*). The reasoning of that decision was that the debtors are not entitled to call in aid the provisions of section 8 for the purpose of showing that the ultimate debt is one to which the provisions of section 8 have to be applied. In deciding the question whether the liability is one bearing interest at not more than nine per cent. per annum the Court has to look to the actual liability sought to be scaled down and cannot take into consideration any pre-existing liability, which only becomes relevant if and when it has been found that the provisions of Act IV have to be applied to the debt. Accepting this decision as correct, we have to consider whether it governs facts such as those now before us.

We have held in *Ramamurti* v. *Sitaramayya*[2] that when there is a decree based on a compromise, it is the compromise which is the contract, the liability under which has to be scaled down and if that compromise can be shown to be a renewal of a pre-existing liability arising before 1st October, 1932, then the debtor would be entitled to go back to that pre-existing liability under the terms of section 8 of the Act. It has been objected that an award passed on an agreement of the parties to refer their dispute to an arbitrator stands on a different footing from a compromise upon which a decree is based. We are of opinion that, at any rate, for the purpose of the application of Act IV of 1938, such an award is the starting point of a new liability embodied in the decree which can only be re-opened under the Act on the footing that it is a renewal or inclusion in a fresh document of a pre-existing debt. We have been referred to the decisions in *Subbaraju* v. *Venkataramaraju*[3] and *Chanbasappa* v. *Basalingayya*[4], where it was recognised that Order 23, rule 3 of the Civil Procedure Code applies to an award on reference to an arbitrator by the parties outside Court even if all the parties do not accept the award ; that is to say, such an award is treated as an adjustment or compromise of the suit. It is moreover to be noted that in the present case the applicants themselves sought to go behind this award on the footing that it was a renewal or inclusion in a fresh document of the pre-existing debts. If the award is as we think it must be treated as a renewal of the pre-existing debts the preamble stating the amount due on the previous indebtedness—both the principal and interest—is nothing more than a process of calculation of the principal amount of the fresh document having regard to the obligations which it discharges ; that is to say, it renews the previous debts and starts a fresh liability carrying interest at the rate stipulated for the future. The fact that it recites a higher rate of interest on the old debts which are discharged is no ground for holding that the liability which actually ripened into the decree was one carrying more than nine per cent. per annum interest.

In this view we hold that the respondent is entitled to the protection of section 10 (2) (*iii*) of the Act and that the decree is not liable to be scaled down. We therefore dismiss the revision petition with costs of the first respondent.

B.V.V. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUNHI RAMAN.

Lakshmana Koro and another .. *Appellants** (*Petitioner-Appellants*)

v.

Malladi Visweswara Patrudu and another .. *Respondents* (*Respts.-Respts.*).

Civil Procedure Code (V of 1908), section 47—Execution petition filed a few days before decree became barred —Dismissal of petition for failure to file sale papers, etc.—Order appealable.

1. (1941) 2 M.L.J. 509.
2. (1940) 2 M.L.J. 293 : I.L.R. (1940) Mad. 947.
3. (1928) 55 M.L.J. 429 : I.L.R. 51 Mad. 800.
4. (1927) I.L.R. 51 Bom. 908 (F.B.).

*A. A. A. O. No. 257 of 1941. 23rd November, 1942.

An order on an execution petition filed a few days before the decree became completely barred by limitation under section 48, Civil Procedure Code, was as follows :

" . . . . . the judgment-debtor (respondent) is *ex parte*. Sale papers and encumbrance certificate are not filed. Dismissed. No costs. Attachment to cease."

On the question whether an appeal lies from the order,

Held, that in the circumstances of the case, the order is one falling under section 47 of the Code of Civil Procedure and consequently an appeal does lie from that order which cannot be treated as one of dismissal for default under Order 21, rule 57 of the Civil Procedure Code.

Mohim Chandra De v. *Mohendra Kumar De Sarkar*, (1920) 57 I.C. 905 and *Mst. Durga Devi* v. *Hans Roy*, (1929) I.L.R. 11 Lah. 402, applied.

Amarendranath v. *Balai Chand*, A.I.R. 1936 Cal. 267, distinguished.

Appeal against the order of the Court of the Subordinate Judge of Chicacole, dated 18th February, 1941, in A. S. No. 151 of 1940 preferred against the order of the Court of the District Munsiff of Sompeta, dated 18th July, 1940, in E. P. No. 132 of 1940 in O. S. No. 35 of 1928.

P. V. Rajamannar and *K. Subba Rao* for Appellants.

Respondents not represented.

The Court delivered the following

JUDGMENT.—The decree-holder is the appellant. An interesting question of law arises in this appeal and relates to the applicability of section 47 of the Civil Procedure Code in the following circumstances. The decree in the present case was passed in O. S. No. 35 of 1928 on the 20th April, 1928. On the 25th March, 1940, a few days before the decree became completely barred by limitation under section 48 of the Civil Procedure Code, an execution petition which was numbered as E. P. No. 132 of 1940 was filed in the Court of the District Munsiff of Sompeta. The amount which was sought to be recovered by attaching the immovable properties of the judgment-debtor was Rs. 3,640-13-6. The learned District Munsiff fixed the 18th July, 1940, for filing sale papers and encumbrance certificate and adjourned the execution petition to that date. On that date the order made is in the following terms:

" . . . . the judgment-debtor (respondent) is *ex parte*. Sale papers and encumbrance certificate are not filed. Dismissed. No costs. Attachment to cease."

From this order an appeal was presented to the Court of the Subordinate Judge of Chicacole. Before the learned Subordinate Judge the respondent appeared and raised a preliminary objection that the appeal did not lie. This objection has been upheld by the lower appellate Court, which has rejected the appeal. From that order the present civil miscellaneous second appeal is filed. The respondent is not represented in this Court.

Mr. Subba Rao the learned advocate for the appellant contends that the view taken by the lower appellate Court that the order appealed from was one of dismissal for default under Order 21, rule 57, Civil Procedure Code, and that consequently no appeal lay from that order is not in accordance with law. Learned counsel argues that in the present case in any event since the dismissal was of an execution petition which was the last of its kind that could have been filed within the period of limitation for executing the decree in O. S. No. 35 of 1928, the order must be held to be one falling under section 47 of the Civil Procedure Code. He refers to the definition of " decree " contained in section 2, clause 2 of the Civil Procedure Code and argues that the order in the present case conclusively determines the rights of the parties with regard to all the matters in controversy in the suit and that in the special circumstances of this case the lower appellate Court ought to have held that it was an order falling under section 47. The principle underlying this contention seems to have been recognised by the Calcutta High Court in the decision reported in *Mohim Chandra De* v. *Mohendra Kumar De Sarkar*[1] and by the Lahore High Court in *Mst. Durga Devi* v. *Hans Raj*[2]. This view is quoted with approval in the commentaries of Sir Dinshaw Mullah on the Code of Civil Procedure at page 9 of the eleventh edition. The lower appellate

1. (1920) 57 I.C. 905.
2. (1929) I.L.R. 11 Lah. 402.

Court has in support of its conclusion, relied upon the decision of the Calcutta High Court reported in *Amarendranath* v. *Balai Chand*[1]. That case may be distinguished on the ground that the execution petition that was dismissed was not the last that could have been filed and that there was still time for presenting another execution petition within the period of limitation. Accepting the principle recognised in the decisions in *Mohim Chandra De* v. *Mohendra Kumar De Sarkar*[2] and *Mst. Durga Devi* v. *Hans Raj*[3], I hold that the order made by the learned District Munsiff in the present case is an order falling under section 47 of the Civil Procedure Code and that consequently an appeal does lie from that order.

The decision of the lower appellate Court must therefore be set aside and the appeal remanded to that Court for disposal according to law. The appellant shall have his costs in this Court.

K.S. ——— *Appeal allowed and remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BYERS.

Srinivasa Ayyangar and another .. *Petitioners** (*Accused*).

Motor Vehicles Act (IV of 1939), sections 42 (1) and 123—Rules framed under—Liability of driver for lack of observance of rules—Not permissible when his duties are limited.

When rules have been framed under the rule making power provided by the Motor Vehicles Act, by which the responsibilities of the driver and the conductor have been separately laid down, it follows that sections 42 (1) and 123 of the Act are controlled by these rules.

Where the driver of a motor bus was convicted for contravening the conditions of its permit in regard to the carrying of goods which were not personal luggage,

Held, that since under rule 216 (1) the driver's responsibility regarding the passengers and goods in the vehicle is limited to seeing that the driver's seat is not occupied or his vision interfered with contrary to the rules, he cannot be held liable for the contravention of a rule from the due observance of which he has been statutorily exempted, and responsibility placed solely on the conductor.

Petition under sections 435 and 439 of the Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the City First Class Magistrate of Madura in C. A. No. 70 of 1942 preferred against the judgment of the Court of the Sub-Magistrate of Melur in C. C. No. 641 of 1942.

K. S. Jayarama Aiyar for *C. K. Venkatanarasimham* for Petitioners.

A. S. Sivakaminathan for the Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—The petitioners are the owner and the driver of a motor bus which was found carrying goods contrary to the conditions of its permit and they were convicted and fined under section 42 (1) read with section 123 (1) of the Motor Vehicles Act. The convictions and sentences were upheld on appeal. The correctness of the conviction of the driver has been attacked on the ground that it is no part of a driver's duty when there is a conductor present to supervise the loading of the vehicle. Objection has also been taken to the admission of certain evidence in proof of the carriage of the goods, Mr. Jayarama Aiyar contending that the only evidence let in on this point was hearsay and, if this be excluded, there is no proof that goods were in fact being carried.

Dealing with the first point, section 123 (1) of the Motor Vehicles Act imposes liability on any person driving a motor vehicle otherwise than in accordance with the conditions of its permit, but it is contended that the responsibility of the driver for the loading of the vehicle in excess of its carrying capacity or allowing goods to be carried in excess or contrary to the conditions of the permit is excluded by the rules framed under Chapter IV. This chapter deals with the issue of permits, the conditions applicable to those permits and the issue of rules regulating the working of transport vehicles. Rule 217 of the Motor Vehicles Rules imposes on the driver and the conductor the duty of observing certain rules, of which the first is in these

---

1. A.I.R. 1936 Cal. 267.
2. (1920) 57 I.C. 905.
3. (1929) I.L.R. 11 Lah. 402.

*Criminal Revision Case No. 695 of 1942. 13th January, 1943.
(Criminal Revision Petition No. 655 of 1942).

words,

"The driver and the conductor of a public service vehicle while on duty shall, as far as may be reasonably possible having regard to his duties, be responsible for the due observance of the provisions of the Act and of these rules."

The next rule lays down the duties of the conductor of a public service vehicle and these include seeing that no person is carried in excess of the seating capacity of the vehicle and that where goods are carried on the vehicle in addition to passengers, precautions are taken to ensure that passengers are not endangered or inconvenienced by the presence of the goods. It is also the duty of the conductor to see that nothing is placed in the vehicle in such a manner as to obstruct the entry or exit of passengers and upon him is placed also the duty of taking all reasonable precautions to prevent luggage being miscarried or lost on the way. The duties of the driver are laid down in Rule 216 and the only clause in this rule relating in any way to the carriage of passengers or goods is the first, which is in these words,

"The driver of a public service vehicle while on duty shall not cause or allow any person, animal or thing to be placed or to be in the space reserved for the driver's seat in accordance with rule 365 or otherwise in such a way as to impede him in having a clear vision of the road or proper control of the vehicle."

In specific words there is no rule placing upon the driver or the conductor the duty of seeing that goods are not carried in a vehicle contrary to the conditions of its permit, but it is clear from what has been said about rule 218 that it is the duty of the conductor to exercise supervision over the loading of the vehicle with passengers, luggage and goods. Rule 217 (1) limits the responsibility of the driver and the conductor for the general observance of the rules to what is reasonably possible having regard to their duties and no elaborate argument is needed in support of the contention that when there is a conductor present, the driver cannot exercise supervision over the entry and exit of passengers or the loading of the vehicle with luggage or goods. Under rule 216 (1) the driver's responsibility regarding the passengers and goods in the vehicle is limited to seeing that the driver's seat is not occupied or his vision interfered with contrary to the rules.

The learned Public Prosecutor has however contended that in spite of these rules, section 123 of the Act is wide enough to impose liability on the driver for the carrying of goods contrary to the conditions of its permit. If there were no rules framed under the Act there would be considerable force in this argument, but where rules have been framed under the rule-making power, by which the responsibilities of the driver and the conductor have been separately laid down, it follows that sections 42 (1) and 123 of the Act are controlled by these rules. I accordingly find that the driver cannot be held liable for the contravention of a rule from the due observance of which he has been statutorily exempted and responsibility placed solely on the conductor.

Regarding the owner, Mr. K. S. Jayarama Aiyar does not challenge the propriety of the conviction under section 42 (1) read with section 123 of the Act, provided there is evidence showing that goods were in fact being carried contrary to the conditions of the permit. The evidence on this point is that of the Head Constable who detected the case. His evidence has been briefly referred to by the trying Magistrate in these words,

"He checked M. D. U. 449 . . . . . and found 9 baskets of grapes and three bundles of betels on the top of the bus. He inquired all the passengers in the bus and none of them admitted ownership of the goods. The conductor had issued a ticket for the 12 articles and kept it with him."

Mr. Jayarama Aiyar contends that this is hearsay evidence. The exact form in which the evidence was given cannot be ascertained because the case was dealt with summarily. If the Head Constable attempted to relate exactly what words the passengers used when they were questioned about the ownership of these twelve baskets, then the evidence, strictly speaking, would be hearsay and inadmissible, but if the Head Constable stated that he endeavoured to ascertain the owners of these packages and that no one claimed them, that answer is admissible and is sufficient upon which the learned Magistrate could conclude that the packages were goods and not personal luggage. Moreover, there was a ticket, which had

been issued for them which was in the possession of the conductor instead of being in the possession of any passenger to whom the goods belonged. There was therefore sufficient admissible evidence on which the learned Magistrate could conclude that the articles were goods and not personal luggage. So far as the owner is concerned no fault can be found with the propriety of the conviction.

In the result the conviction of the second petitioner is set aside and the fine, if paid, is ordered to be refunded. The suspension of the driving license is also directed to be set aside. In respect of the first petitioner, the petition is dismissed.

K.C. *Conviction of second petitioner set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMAYYA AND MR. JUSTICE HAPPELL.

Veerabhadra Naicker .. *Appellant** (*Opposite Party*)

v.

Gangamma .. *Respondent* (*Applicant*).

Workmen's Compensation Act (*VIII of 1923*), *section 3—Workman bunkering coal in wharf—Death due to rice bags falling from crane—Path used not prohibited in fact—Effect of notice-board warning people—Accident occurring fifteen minutes after day's work—Accident whether in the course of employment.*

The deceased workman was employed for the purpose of bunkering coal in a wharf. There were two routes which were usually taken by the workmen while getting out of the harbour. The deceased wanted to go along one passage and in order to do so he had to go near a place where a crane was working. While he was near that point some rice bags which were being unloaded from a ship fell from the crane upon the deceased person who was crushed to death. A relation of the deceased having claimed compensation the employer contended that the accident was not one "arising out of and in the course of his employment." The evidence disclosed that the bunkering of the coal by the workmen was completed at 7-45 P.M. and that the accident occurred at 8 P.M. It also appeared that a notice had been put up that people should take care while passing along that route and that a watch had been kept there to warn people from going near the moving crane. At the same time the evidence disclosed that the coolies were free to go wherever they liked in the harbour, and that they were entitled to use the passage near the place where the crane was fixed.

Held, that in this case, the interval of fifteen minutes between the bunkering of the coal and the accident was not unnecessary or unreasonable and that the accident did not cease to arise in the course of employment by reason of such interval.

Held further, that the user of the passage wherein the accident occurred, by the deceased workman was not a prohibited one and the mere fact that there was a notice put up warning people against going near the moving crane was not a prohibition so as to disentitle the claimant from obtaining compenastion.

Gane v. *Norton Hill Colliery Co.*, (1909) 2 K.B. 539, relied on.

Appeal against the order of the Court of the Commissioner for Workmen's Compensation, Madras, dated 6th October, 1941, and made in Case No. 271 of 1940.

K. S. Rajagopala Aiyangar for Appellant.

C. A. Vaidyalingam and *S. K. Gajendram Naidu* for Respondent.

The Judgment of the Court was delivered by

Somayya, J.—This is an appeal by the employer against the award of compensation to a relation of a deceased workman who met with his death, while returning from the harbour, the place where he was working. The deceased workman was employed for the purpose of bunkering coal in wharf No. 3. There were two routes which were usually taken by the workmen while getting out of the harbour, one marked F and the other marked G in the sketch Ex. I. In this case the deceased wanted to go along the passage G and in order to get to that passage from the place where he was actually working, one has to go near the point marked E in the sketch. While the deceased was near that point, some rice bags fell from a crane. It appears that certain rice bags were being unloaded from a ship by a crane and that the rice bags fell upon the deceased and he was crushed to death. The question is whether this accident occurred to the workman by accident "arising out of and in the course of his employment." On the evidence adduced

---

*A. A. O. No. 51 of 1942. 7th January, 1943.

on behalf of both the parties, it is clear that the bunkering was completed only at about 7-45 P.M. The accident occurred at about 8 o'clock. One has necessarily to take some rest before returning home after the hard work of bunkering coal and one cannot say that in this case an interval of 10 or 15 minutes was unnecessary or unreasonable as contended by the employer.

The next defence put up by the employer was that the route along which the deceased workman was passing was a prohibited route, that a notice had been put up that people should take care while passing along the route, that a watch was kept to warn people from going near the moving cranes and that therefore the route taken by the deceased was a prohibited route. As the Commissioner has pointed out accepting the evidence of Mr. Dring,

"Persons are free to go along the harbour . . . . The labourers are free to go anywhere they like. The labourers can go either through passage F or G . . . . There is a watch kept near the place where bags are landed to warn people of the danger. There is a notice that people should take care of themselves when they go near moving cranes or trains. The bunkering labourers have no work to go to E . . . . To go through passage the deceased would have to go near the place marked E. It is usual for the labourers to take rest near the goods storage shed before going home."

From this evidence, which there is no reason to distrust, it is clear that the coolies were free to go wherever they like in the harbour, that there were two passages, marked F and G either of which the labourers were entitled to take and that in order to go along the passage G, one has to go near E. The mere fact that there was a notice put up warning people against going near moving cranes is not, in our opinion, a prohibition, nor can it be said that the workmen were prohibited from going near E.

In *Gane* v. *Norton Hill Colliery Co.*[1], a collier left his work, after coming up from the pit, by a route which crossed on the level ground some lines of rail belonging to and under the control of his employers. At the time the workman tried to cross there were some trucks standing on the line, and he tried to get under them ; as he was doing so the trucks moved, and he was seriously injured. The County Court Judge found on the facts that there were three ways by which the workman might have gone home, but the way he went by was the shortest, was always used by all the workmen who lived in the same direction as the applicant, and was so used with the knowledge and consent of the employers. It was held that the accident arose out of and in the course of the applicant's employment within the meaning of the Workmen's Compensation Act.

In that case there were three routes. One of them lay across the railway line on which there were trucks. The workman saw the trucks and was getting underneath one of them. As he did so, the trucks moved, and he was seriously injured. Notwithstanding all this, it was held that the Act applied and that the workman was entitled to compensation.

We are of opinion that the principle of this decision applies to this case and that the order of the Commissioner is right. The appeal is dismissed with costs.

B.V.V. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BYERS.

Sadhu Suryanarayana ... *Petitioner** (*Respondent*)

v.

Sadhu Lakshmi Sundaramma and others .. *Respondents* (*Petitioners*).

Criminal Procedure Code (V of 1898), sections 488 and 489—Order for maintenance of daughter—Marriage of daughter—If can be set up as "sufficient cause" for discontinuing payment in an application for enforcement of payment.

A father can in defence to an application for the enforcement of an order of maintenance against him in respect of his daughter plead that the daughter had married and therefore he is not bound

1. (1909) 2 K.B. 539.

*Crl. R. C. No. 671 of 1942. 7th January, 1943.
(Crl. R. P. No. 633 of 1942).

to pay any maintenance for her subsequent to the date of her marriage. The marriage of his daughter is a " sufficient cause " within the meaning of section 488 (3) for failure to comply with the order and it cannot be said that his only remedy is by way of an application under section 489 of the Criminal Procedure Code to get the order varied in his favour on the ground of " change in circumstances." The " change in circumstances " referred to in section 489 is a change in the pecuniary or other circumstances of the party paying or receiving the allowance which would justify an increase or decrease of the amount of allowance fixed and not a change in the status of the parties which would entail a stoppage of the allowance.

Shah Abu Ilyas v. *Ulfat Bibi*, (1896) I.L.R. 19 All. 50 and *Mohamed Anser Sahib* v. *Zubeda Bee*, (1933) M.W.N. 121, referred to.

Petition under sections 435 and 439 of the Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of the Sub-Divisional Magistrate of Narasaraopet, dated 12th August, 1942, and made in M. C. No. 28 of 1942.

K. Bhimasankaram for Petitioner.

N. Subramaniam for Respondents.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—In defence to an application for the enforcement of an order of maintenance against him in respect of his wife and his three daughters, the petitioner pleaded that the eldest of the three daughters had been married and he objected to paying any maintenance for her subsequent to the date of her marriage. The learned Magistrate held that the petitioner's only remedy was to file an application under section 489 of the Criminal Procedure Code and to get the order varied in his favour. As he had failed to do so, the learned Magistrate declined to consider the question and ordered maintenance to be paid in accordance with the terms of the pre-existing order.

It was decided by a Full Bench of the Allahabad High Court in *Shah Abu Ilyas* v. *Ulfat Bibi*[1] that the " change in circumstances " referred to in section 489 of the Code is a change in the pecuniary or other circumstances of the party paying or receiving the allowance which would justify an increase or decrease of the amount of the monthly payment originally fixed and not a change in the status of the parties which would entail a stoppage of the allowance. In that particular case the husband against whom enforcement of an order was sought had set up the divorce of his wife as a defence. The same view was expressed by a single judge of this Court in the case of *Mohamed Anser Sahib* v. *Zubeda Bee*[2], in which it was held that divorce was not a change in circumstances but a change in status. It follows, therefore, that the view of the learned Magistrate that the petitioner's only remedy was by way of an application under section 489 of the Criminal Procedure Code is erroneous. It was open to the petitioner to set up the marriage of his daughter as a sufficient cause within the meaning of section 488 (3) for failure to comply with the order in so far as she was concerned.

In the result, the petition is allowed and the order is set aside and the petition remanded to the lower Court for further disposal after considering the plea of marriage set up by the petitioner.

K.S. *Petition allowed.*

[PRIVY COUNCIL.]

PRESENT :—LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, LORD ROMER, SIR GEORGE RANKIN AND SIR MADHAVAN NAIR.

Mussammat Sahodra .. *Appellant**

v.

Ram Babu .. *Respondent.*

Hindu Law of Inheritance (Amendment) Act (II of 1929), section 2—" Sister " and " sister's son "—Whether include half-sister and half-sister's son—Rules of Mitakshara—Guidance from—Half-sister when entitled to succeed—Full sister and half-sister, if would take together—Half-sister's son and father's uncle's son—Preferential right—Scope and applicability of Act.

---

1. (1896) I.L.R. 19 All. 50. 2. (1933) M.W.N. 121.

*P. C. Appeal No. 46 of 1940. 13th October, 1942.

In the law of the Mitakshara the principle is fundamental that the primary test on all questions of inheritance is propinquity in blood. The object of the Hindu Law of Inheritance (Amendment) Act (II of 1929) is to give effect to the principle of propinquity by bringing into the order of succession some of those persons more nearly connected with the propositus by ties of blood than others whose connection with him though as *sapindas* is but remote In the absence of an interpretation clause in the Act, the Courts should interpret the terms of the enactment in the sense in which they are used in the Mitakshara.

Held, that the term " sister " in section 2 of the Act would include a half-sister, that is, a sister by the same father though the mother be different, but cannot be extended beyond that to include one who has not the same father. Although a sister will include a half-sister the latter will take the inheritance only when there is no full sister to claim it.

Held further, that the term " sister's son" in section 2 of the Act would similarly include a half-sister's son, and as between a father's uncle's son and a son of the half-sister the latter will be entitled to succeed.

Amrut v. *Mst. Thagan,* I.L.R. (1939) Nag. 115 (F.B.), approved.

Ram Adhar v. *Sudeshra,* (1933) I.L.R. 55 All. 725 (F.B.); *Khabootra Mussamat* v. *Ram Padarath,* (1935) I.L.R. 11 Luck. 148; *Angamuthu* v. *Sinnapennammal,* A.I.R. 1938 Mad. 364 and *Mt. Daulatkuar* v. *Bishundeo Singh,* A.I.R. 1940 Pat. 310, overruled.

The provisions of Act II of 1929 would apply to the persons specified therein even in those provinces where they were not heirs according to the prevailing view of the Mitakshara.

On appeal from a decision of the Allahabad High Court.

S. P. Khambatta for Appellant.

Respondent not represented.

Their Lordships' judgment was delivered by

SIR MADHAVAN NAIR.—This is an appeal from a decree of the High Court of Judicature at Allahabad, dated 13th April, 1937, which affirmed a decree of the Court of the Subordinate Judge at Muttra in favour of the plaintiff dated 13th September, 1933.

The only question for decision is one of law, *viz.,* whether the words " sister's son " in section 2 of the Hindu Law of Inheritance (Amendment) Act, 1929—which will hereinafter be referred to as " the Act " —include the son of a half-sister. Section 2 of the Act is as follows :—

" A son's daughter, daughter's daughter, sister and sister's son shall, in the order so specified, be entitled to rank in the order of succession next after a father's father and before a father's brother ;

Provided that a sister's son shall not include a son adopted after the sister's death."

The facts of the case are not in dispute and need not be referred to in detail. The parties are Hindus governed by the law of the Mitakshara. The property in the suit belonged to one Krishna Murari who was the last male owner. It was claimed by Ram Babu, the plaintiff, who is Krishna Murari's father's uncle's son. His claim was resisted by Mussammat Sahodra, the defendant, for herself and on behalf of her son Dhanpat. Mussammat Sahodra is the half-sister of Krishna Murari, being his father's daughter, by his first wife. When succession opened, these were the two claimants to the estate, *viz.,* Ram Babu and Dhanpat. Dhanpat died during the pendency of the appeal.

Apart from the Act, Ram Babu as Krishna Murari's father's uncle's son would, as a *sapinda,* be entitled to succeed to the estate of Krishna Murari as the nearest reversioner, in preference to Dhanpat, his half-sister's son who is only a *bandhu.* Under the Act however, the persons named in section 2 inherit with *gotraja sapindas,* and a " sister's son " coming next after a "sister " enjoys priority in succession over the father's paternal uncle's son. If Dhanpat, as the son of the half-sister of Krishna Murari, was entitled under the Act to inherit the suit property, then Mussammat Sahodra as his mother would be entitled to succeed him under the ordinary law.

It was urged in the Courts in India that the words "sister's son" in section 2 of the Act would include a half-sister's son and Dhanpat would therefore have a preferential claim to succeed to the estate of Krishna Murari, but this contention was negatived by the Courts, following the decision in *Ram Adhar* v. *Sudeshra,*[1]

In this appeal by the defendant, the same contention has been urged, the argument being that by the Act " sister " has been admitted as an heir under the

1. (1933) I.L.R. 55 All. 725 (F.B.).

Mitakshara law, that the term "sister" in section 2, includes a half-sister and by parity of reasoning the words "sister's son" would include a half-sister's son. It is to be regretted that the respondent has not been represented, but Mr. Khambatta who has argued the case for the appellant with skill and ability has placed before the Board fairly and fully all the relevant facts and arguments.

There is divergence of judicial opinion among Courts in India regarding the construction of section 2 of the Act. In *Ram Adhar* v. *Sudeshra*[1], the Full Bench of the Allahabad High Court held that "the word 'sister' in section 2 of the Hindu Law of Inheritance (Amendment) Act, 1929, does not include a half-sister, either consanguine or uterine." The main grounds for the decision are, that the word "sister" in the English language ordinarily means a sister of the whole blood and that "if we hold that 'sister' in section 2 of Act II of 1929 includes a half-sister, we shall be putting a sister and half-sister in the same category"—which would be against the spirit of the Mitakshara law under which a relation of the full blood excludes a relation of the half-blood, and "shall be introducing a 'half-sister' between the words 'sister' and 'sister's son' . . ." The learned Judges observed that the Act,

> "is an enabling Act which introduces certain persons as heirs who had no such place according to the ordinary interpretation of the Mitakshara law. Unless we have a clear reason to believe that the Legislature was introducing by implication a person not specifically mentioned as heir, we have no right to give the word 'sister' a wider meaning than it would ordinarily bear."

They also observed,

> "If we hold that a sister includes a half-sister, then there will be no reason to make a distinction between a uterine sister and a consanguine sister . . . . ordinarily it would be repugnant to the notions of Hindus to recognise a woman as sister who has not the same father as the person himself."

This decision was followed by a single Judge of the Oudh Chief Court in *Khabootra Mussammat* v. *Ram Padarath*[2], and also by the Madras and Patna High Courts. (See *Angamuthu* v. *Sinnapennammal*[3], and *Mt. Daulatkuar* v. *Bishundeo Singh*[4] The judgment of Chatterji, J., in the last mentioned case is noticeable as it contains the fullest statement of the various reasons that could be urged in support of the rival contentions. All these decisions held that "sister" in section 2 of the Act does not include a half-sister.

Besides the reasons given in *Ram Adhar v. Sudeshra*[1], the other grounds mentioned in these decisions, shortly stated are, that the Act, inasmuch as it alters the law of succession to a certain extent should be strictly construed, that it proceeds on the principle of affinity, that the legislature might have advisedly left out of consideration the "half-sister" and the position of the half-sister is distinct from that of the full sister even in those provinces where she is an heir ; all of which it is said would show that there is no justification for interpreting the word "sister" as including a half-sister.

Differing from the above view, the Nagpur High Court in its Full Bench decision in *Amrut* v. *Mst. Thagan*[5], held that

> "a half-sister who is a child of the same father is an heir under the Hindu Law of Inheritance (Amendment) Act of 1929. The word 'sister' includes a sister by the same father even though the mother be different."

The Court proceeded on the view that under the Act a sister is an heir in all the provinces to which the Mitakshara law applied, that it should be interpreted according to the notions of Hindu Law of which it forms a part, and that as a general rule the law of the Mitakshara recognises no distinction between the full blood and the half-blood except in a competition *inter se*. The learned Judges pointed out that as a sister succeeds as a father's daughter, a half-sister having the same father is an heir if the sister would be an heir. The same Court has also held that a half-sister's son is in the line of heirs and that a "sister's son" in section 2 of the Act would include a half-sister's son. (See *Shankar* v. *Raghoba*[6]).

---

1. (1933) I.L.R. 55 All. 725 (F.B.).
2. (1935) I.L.R. 11 Luck. 148.
3. A.I.R. 1938 Mad. 364.
4. A.I.R. 1940 Pat. 310.
5. I.L.R. (1939) Nag. 115 (F.B.).
6. A.I.R. 1938 Nag. 97.

In *Rameshar* v. *Ganpati Devi*[1], Tek Chand, J. (with whom Dalip Singh, J., agreed) doubted the correctness of the decision in *Ram Adhar* v. *Sudeshra*[2], stating

"with great respect I think that the conclusion of the learned Judges is expressed too broadly and I confess I have grave doubts as to the soundness of the decision and the reasons on which it is based."

The Act is described as,

"An Act to alter the order in which certain heirs of a Hindu male dying intestate are entitled to succeed to his estate."

And the preamble is :—

"Whereas it is expedient to alter the order in which certain heirs of a Hindu male dying intestate are entitled to succeed to his estate."

As the object of the Act is thus to alter the order of succession of certain persons therein mentioned, it is desirable to examine how the law stood with reference to their rights of succession before the Act, and how those rights have been altered by it.

Before the Act, the only females recognised as heirs under the Hindu Law except in Bombay and Madras, were (1) the widow, (2) the daughter, (3) the mother, (4) the father's mother, (5) the father's father's mother. Accordingly, "a son's daughter, daughter's daughter and sister "—the first three persons mentioned in the Act were not heirs at all, except in the presidencies of Bombay and Madras, where the first two of them ranked as *bandhus*. In Bombay, the third, a " sister " is expressly mentioned as an heir in the Mayukha ; though not expressly mentioned as such in the Mitakshara, her right as an heir has long since been recognised. A sister is recognised as a *gotraja sapinda* both in the Mayukha and in the Mitakshara. In Madras, she was recognised as entitled to succeed as *bandhu* but only after the male *bandhus*. A ' sister's son ' ranked everywhere as a *bandhu* before the Act.

Under the Act, all the above-mentioned four persons, " a son's daughter, daughter's daughter, sister and sister's son " are ranked as heirs in a specified order of succession and placed next after a father's father and before a father's brother, thus enabling them to inherit with *gotraja sapindas*.

The Act came into force on the 21st February, 1929. When it began to be enforced, the question arose in certain Courts in India (see *Bhagwan Dei Musammat* v. *Radha Mussammat*[3], *Srimati Sakuntala Devi* v. *Kaushalya Devi*[4], *Rajpali Kunwar* v. *Sarjurai*[5] and *Dalsingar Singh* v. *Mt. Jainath Kuar*[6], whether having regard to the language of the preamble, the provisions of the Act would apply not only to persons who were already heirs under the Mitakshara law, but also to those of the specified persons who were not heirs before the Act ; because the Act, it was said, was merely intended to alter the order in which persons already recognised as heirs would succeed and not to create new heirs. The heading and preamble of the Act do not accurately summarise its provisions, but having regard to the language of section 1 (2) of the Act which says that

"it applies only to persons who but for the passing of the Act would have been subject to the law of the Mitakshara in respect of the provisions herein enacted . . . . . ."

the Courts concluded and in their Lordships' view rightly, that it would apply to the persons specified so as to constitute them heirs even in those provinces where they were not heirs according to the prevailing view of the law of the Mitakshara.

It will thus be seen that the Act has amended and altered the old order of succession in Hindu Law. It affects all Hindus governed by the Mitakshara. Hence it appears to their Lordships that in the absence of an interpretation clause, the Courts should interpret the terms of the enactment in the sense in which they are used in the Mitakshara law. In *Raghuraj Chandra* v. *Subhadra Kanwar*,[7] in considering whether the natural " brother " of the deceased Hindu *taluqdar* who was an adopted son, was a " brother " within the meaning of section 22 (5) of the Oudh Estates Act, I of 1869, as amended by section 14 of the U. P. Act III of 1910

1. (1936) I.L.R. 18 Lah. 525.
2. (1933) I.L.R. 55 All. 725 (F.B.).
3. (1933) I.L.R. 8 Luck. 646.
4. (1936) I.L.R. 17 Lah. 356.
5. (1936) I.L.R. 58 All. 1041.
6. A.I.R. 1940 Oudh 138.
7. (1928) 55 M.L.J. 778 : L. R. 55 I. A. 139 I.L.R. 3 Luck. 76 (P.C.).

and was consequently entitled to the estate in preference to the widow, their Lordships answered the question in the negative, on the ground that the personal law was applicable to the interpretation of the word "brother." They rejected the argument that the Act being expressed in English is its own dictionary.

In the law of the Mitakshara, the principle is fundamental that the primary test on all questions of inheritance is propinquity in blood.

"To the nearest *sapinda* the inheritance next belongs" (Menu, 9, 189). Applying this basic principle of succession, the Hindu Law gives preference to the whole blood over the half blood. As applied to brothers the rule is thus stated in the Mitakshara, Chapter II, section 4, *Placita*, 5 and 6 :—

These run as follows :—

"(5) Among brothers such as are of the whole blood, take the inheritance in the first instance under the text . . . . . 'To the nearest sapinda the inheritance next belongs.' Since those of the half-blood are remote through the difference of the mothers."

"(6) If there be no uterine (or whole) brothers, those by different mothers inherit the estate." (*See* Colebrooke's translation of the Mitakshara).

In *Garuddas* v. *Laldas*,[1], the Board held that,

"the Mitakshara Chapter II, s. 4, vv. 5 and 6, states a principle with regard to the preference of the whole blood to the half-blood applicable to all *sapindas* in the same degree of consanguinity."

In *Jotindranath Roy* v. *Nagendranath Roy*[2], which was a case between *bandhus* it was held that in a Hindu family governed by the Benares school of the Mitakshara law, the father's half-sister's sons have preference as heirs over the mother's sister's sons. In the course of the judgment their Lordships observed: "In *Ganga Sahai* v. *Kesari*[3] it is laid down that 'having regard to the general scheme of the Mitakshara the preference of the whole blood to the half blood is confined to members of the same class or to use the language of the Judges of the High Court in *Subha Singh* v. *Sarafraz Kunwar*[4], to 'sapindas' of the same degree of descent from the common ancestor'." In their Lordships' opinion the principle of the decision applies equally in the case of *bandhus* not descended from a common ancestor but claiming merely on the basis of propinquity. Again the Mitakshara (Ch. 2, section 4, pl. 5 to 7) definitely prefers a half-brother to the son of a full-brother : (see *Krishnaji Vianktuh* v. *Pandurang*[5].)

It follows that the law of the Mitakshara recognises no difference between relations of whole blood and those of half blood which would include sisters and half-sisters as well, except when there is a competition amongst them *inter se*. This has been understood and acted upon as a general principle of Hindu law by the Lahore High Court in *Guranditta* v. *Mt. Jiwani*[6], in which it was held that a half-sister's son is an heir, according to its general principles. There is nothing in the Act itself to show that the interpretation of the word "sister" as including a "half-sister" sanctioned by the Mitakshara, is contrary to its intention, either express or implied. In *Lion Mutual Marine Insurance Association* v. *Tucker*,[7], Brett, M.R., observed

"It is I consider a well-settled rule that in construing a statute or a document it is not right to follow merely the words of the statute or a document, taking them in their ordinary grammatical meaning: but it is necessary also to apply those words to the subject-matter dealt with in the statute or document and then to construe them with reference to that subject-matter unless there is something which compels one not so to construe them. The rule is, I think, that the ordinary meaning of the words used in the English language must be applied to the subject-matter under consideration."

In their Lordships' opinion, the Act should be read as a part of the general Hindu Law of inheritance and when so read, it should be held as already explained, that the word "sister" used in it would include a half-sister. It is obvious that the object of the Act is to give effect to the principle of propinquity by bringing into the order of succession some of those persons more nearly connected with the propositus by ties of blood than others whose connection with him though as *sapindas* is but remote. On the whole, in giving full effect to the principle of propinquity their Lordships cannot find any sufficient reasons to exclude the half blood as such.

1. (1933) 64 M.L.J. 660 : L.R. 60 I.A. 189 (P.C.)
2. (1931) 61 M.L.J. 442 : L.R. 58 I.A. 372 (P.C.).
3. (1915) 29 M.L.J. 329 : L.R. 42 I.A. 177 : I.L.R. 37 All. 545 (P.C.).
4. (1896) I.L.R. 19 All. 215.
5. (1873) 12 Bom.H.C.R. 65.
6. A.I.R. 1937 Lah. 11.
7. (1883) 53 L.J., Q.B. 185 at 189.

However, in thus interpreting the term " sister " as including half-sister one qualification should be made.

It is said that if we hold that a " sister " includes a half-sister, there will be no reason to make a distinction between a uterine and consanguine sister and that it will be repugnant to the ordinary notions of Hindus to recognise a woman as a sister who has not the same father as the person himself. This objection does not seem to be insurmountable. In his annotation under placitum 5, in section V of Chapter II of the Mitakshara, the learned commentator Colebrooke refers to the following text of Nandapandita wherein he says :

> " Kinsmen (bandhus) are *sapindas* and these may belong to the same family or not . . . . The daughters of the father and other ancestors must be admitted like the daughters of the man himself and for the same reason."

Following this text the sister was recognised as heir as *gotraja sapinda* in Bombay ; though elsewhere she was not recognised as an heir except in Madras where she was treated as a *bandhu*. Their Lordships think that the description given by Nandapandita " the daughter of the father " is helpful in interpreting the term " sister " where, as in this Act, it is used to signify an heir with reference to persons governed by the Mitakshara. In their Lordships' opinion, the term " sister " in the Act, would include a half-sister, *i.e*, a sister by the same father even though the mother be different ; but cannot be extended beyond that to include one who has not the same father.

It is stated as an objection that the full-sister and the half-sister must take together, if the word " sister " in the Act includes a half-sister ; but this is too rigid a view. On ordinary principles, the difficulty will not arise ; for, although as recognised under the Mitakshara, a sister will include a half-sister the latter will take the inheritance only when there is no full-sister to claim it.

If the term " sister " in the Act includes a half-sister, then it must be held by parity of reasoning, that the term " sister's son " would include a half-sister's son. In this connection their Lordships would draw attention to the decision in *Subbaraya* v. *Kylasa*[1], where in holding that a half-sister's son is entitled to inherit under the Hindu law in force in the Madras Presidency, the learned Judges pointed out that the position of a half-sister's son in the line of heirs is the same as that of a sister's son. In the course of the judgment they stated as follows :—

> " The relationship between the maternal uncle and his sister's son or step-sister's son is alike that of *sapindas*, for, in both cases, there is a common grandfather and the relation of *sapindas* arises from connection as parts of the body."

In *Shankar* v. *Raghoba*[2], the learned Judges of the Nagpur High Court observed :

> " once it is accepted that the son of a half-sister occupies the same position as the son of a full-sister and consequently falls within that class, and once it is seen that the Hindu law does not speak of them separately in the texts, it must be taken that the legislature was using language familiar to Hindu lawyers and meant to elevate all the persons who formed that particular class and who are ordinarily designated by the term " sister's sons."

Their Lordships find themselves in agreement with the above observations of the learned Judges of the Nagpur High Court.

For the above reasons, their Lordships are unable to accept the conclusion arrived at by the learned Judges in *Ram Adhar* v. *Sudeshra*[3], on which the decision under appeal is based. The Courts in India have not viewed the question from the correct standpoint. In their Lordships' opinion, Dhanpat, the son of the half-sister of Krishna Murari who succeeded to the estate under the Act having died, his mother has under the ordinary law inherited from him.

In the result, their Lordships will humbly advise His Majesty that this appeal should be allowed and the decrees of the Courts in India should be set aside and the suit should be dismissed. The plaintiff will pay the defendant's costs in the High Court and in this appeal ; but in the trial Court, each party will bear its own costs in consonance with its order.

B.V.V. *Appeal allowed.*

---

1. (1891) 2 M.L.J. 89: I.L.R. 15 Mad. 300.
2. A.I.R. 1938 Nag. 97.
3. (1933) I.L.R. 55 All. 725 (F.B.).

[The Madras High Court overruled *Angamuthu Muthiriyan* v. *Sinnapennammal*, (1937) 47 L.W. 286, referred to in the above judgment of the Board in *Pappammal* v. *Meenammal*, (1943) 1 M.L.J. 1 (F.B.), and held to the same effect as the view taken by the Board. The decision of the Board, rendered exactly one month earlier, was not available to their Lordships of the Madras High Court when the Full Bench decision was given.—*Rep.*]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

Hindustan Gilt Jewel Works represented by Thota Subba Rao and others .. *Appellants** (*Defts.*)

v.

Chilamkurti Gangayya (died) and others .. *Respondents* (*Plffs. & L. Rs.*).

Defamation—Statement in pleading—Rule of absolute privilege—Applicability—Limits of the rule—Statement having reference to inquiry—Whether privileged.

The English rule that a witness in a Court of Justice is absolutely privileged with regard to anything he may say as a witness when it has reference to the inquiry is applicable in India. And there is no difference in principle between a statement made by a person in the witness-box and a statement made by a party to a suit in his plaint or written statement. Consequently in a civil action for defamation there is absolute privilege for a statement made in a pleading provided that the statement has reference to the inquiry.

In a passing-off action between rival traders, the plaintiff alleged in his plaint as follows: " Thereupon envy and malice sprung up into their minds, especially defendants who began to wage a rate-war and ever since trying to ruin the business of the plaintiffs. To that purpose defendants have resorted to nefarious practices and other questionable means among which interception of postal correspondence is one."

Held, that the statement complained of was not entirely irrelevant to the inquiry and was therefore privileged.

Baboo Gunnesh Dutt Singh v. *Mugneeram Chowdhury*, (1872) 11 Beng.L.R. 321 (P.C.) and *Seaman* v. *Netherclift*, (1876) 2 C.P.D. 53, relied on.

Appeal against the decree of the Court of the Subordinate Judge of Masulipatam in A. S. No. 97 of 1939 presented against the decree of the District Munsiff of Masulipatam in O. S. No. 467 of 1937.

V. T. Rengaswami Aiyangar and *K. S. Sankararaman* for Appellants.

S. Ramaswami Aiyar, *K. S. Jayarama Aiyar* and *C. K. Venkatanarasimham* for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—This appeal raises the question whether in India statements made in pleadings are absolutely privileged or whether the privilege is qualified.

The suit which has given rise to this appeal was filed by the respondents in the Court of the District Munsiff of Masulipatam for damages for defamation. The alleged defamatory words were contained in a plaint filed by the appellants in the same Court in a passing-off action instituted against the respondents. The parties are rival traders and carry on business within a few miles of one another. The goods in which they trade consist of gilt and electroplated jewellery. In their plaint the appellants averred that the respondents had pursued a course of conduct with the object of ruining the appellants' business. The appellants were the successors in business of a firm known as T. Subba Rao and Brothers, who used to obtain their supplies from the respondents. In 1927, the appellants established a workshop of their own and began to manufacture these goods themselves. This resulted in the cessation of business relations between the parties and according to the appellants caused the respondents to do all that lay within their power to injure the appellant's business. They alleged that the respondents had interfered with the correspondence which they had with their customers through the post. In paragraph 7 of the plaint filed by the appellants in the suit against the respondents there is this statement,

" Thereupon envy and malice sprung up into their minds, especially defendants who began to wage a rate-war and ever since trying to ruin the business of plaintiffs. To that purpose defendants

*S. A. No. 499 of 1940. 11th December, 1942.

have resorted to nefarious practices and other questionable means among which interception of postal correspondence is one."

The respondents' action is based on the latter part of this statement. The District Munsiff held that absolute privilege attaches to pleadings and consequently dismissed the suit. On appeal the Subordinate Judge considered that there was only a qualified privilege and as he found that the appellants were actuated by malice in making this statement he awarded the respondents Rs. 750 as damages. The present appeal is from that decree. The case has been referred to a Bench because of the importance of the question involved.

A Full Bench of five judges of this Court in *Tiruvengada Mudali* v. *Tripurasundari Ammal*[1] held that defamatory statements made in complaints to Magistrates are not absolutely privileged and therefore unless they are made in good faith the complainant is guilty of defamation. This decision was based on the wording of the eighth exception to section 499 of the Indian Penal Code. It was held that as there was provision in an Indian statute which was applicable, the rules of English Common Law could not be applied. The question referred related solely to criminal proceedings and the Court stated that it had nothing to say as to how far the complainant might be protected from civil proceedings. Therefore this decision has no bearing on the question now under discussion. In *Ramanamma* v. *Appalanarasayya*[2] this Court did, however, say that in the matter of defamation, there was a good deal of difference between a suit for damages and a criminal prosecution. The prosecution was governed by the provisions of the Indian Penal Code, the suit by the English Law of slander and libel. A defence which was open to the accused in a prosecution was not open to him as the defendant in a suit.

As long ago as 1872, the Privy Council in *Baboo Gunnesh Dutt Singh* v. *Mugneeram Chowdhury*[3] held that a witness could not be sued for damages in respect of evidence given by him in a judicial proceeding, as there was absolute privilege. There can be no difference in principle between a statement made by a person in the witness-box and a statement made by a party to a suit in his plaint or written statement. The Calcutta High Court in *Madhab Chandra Ghosh* v. *Nirode Chandra Ghose*[4] and the Bombay High Court in *Nathji Muleshwar* v. *Lalbhai Ravidat*[5] have held that there is absolute privilege. In the Calcutta case the alleged defamatory statement was contained in a report sent to the police regarding the commission of a crime. In the Bombay case the alleged defamatory statement was contained in a petition presented in civil proceedings.

We consider that the English rule should apply in civil proceedings. In fact a contrary opinion does not appear to be open in view of the decision of the Privy Council in *Baboo Gunnesh Dutt Singh* v. *Mugneeram Chowdhury*[3], but it is to be borne in mind that there exists a qualification. While there is absolute privilege where the statement is pertinent to the inquiry, this does not hold good when the statement is entirely irrelevant to it.

In *Seaman* v. *Netherclift*[6], Cockburn, C.J., Bramwell, J.A. and Amphlett, J.A., held that a witness in a Court of Justice is absolutely privileged with regard to anything he may say as a witness when it has reference to the inquiry, but Cockburn, C.J., observed :—

" It was there—*Dawkins* v. *Lord Rockby*[7]—expressly decided that the evidence of a witness with reference to the enquiry is privileged, notwithstanding it may be malicious ; and to ask us to decide to the contrary is to ask what is beyond our power. But I agree that if in this case, beyond being spoken maliciously, the words had not been spoken in the character of a witness or not while he was giving evidence in the case, the result might have been different. For I am very far from desiring to be considered as laying down as law that what a witness states altogether out of the character and sphere of a witness, or what he may say dehors the matter in hand, is necessarily protected. I quite agree that what he says before he enters or after he has left the witness-box is not privileged which was the question in the case before Lord Ellenborough (*Trotman* v. *Dunn*[8]). Or if a man when in the

1. (1926) 51 M.L.J. 112 : I.L.R. 49 Mad. 728 (F.B.).
2. (1931) 62 M.L.J 230 : I.L.R. 55 Mad. 346.
3. (1872) 11 Beng.L.R. 321 (P.C.).
4. I.L.R. (1939) 1 Cal. 574.
5. (1889) I.L.R. 14 Bom. 97.
6. (1876) 2 C.P.D. 53.
7. (1875) L.R. 7 H.L. 744.
8. (1815) 4 Camp. 211 : 171 E.R. 67.

witness-box were to take advantage of his position to utter something having no reference to the cause or matter of inquiry in order to assail the character of another, as if he were asked : were you at York on a certain day? and he were to answer : Yes, and A.B. picked my pocket there ; it certainly might well be said in such a case that the statement was altogether dehors the character of witness, and not within the privilege."

Bramwell, J.A., said :—

" I can scarcely think a witness would be protected for anything he might say in the witness-box wantonly and without reference to the inquiry. I do not say he would not be protected. It might be held that it was better that everything a witness said as a witness should be protected, than that witnesses should be under the impression that what they said in the witness-box might subject them to an action. I certainly should pause before I affirmed so extreme a proposition, but without affirming that, I think the words ' having reference to the inquiry ' ought to have a very wide and comprehensive application, and ought not to be limited to statements for which, if not true, a witness might be indicted for perjury, or the exclusion of which by the Judge would give ground for a new trial ; but ought to extend to that which a witness might naturally and reasonably say when giving evidence with reference to the inquiry as to which he had been called as a witness."

There is an indication of the acceptance of this qualification in the decisions of this Court in *Sullivan* v. *Norton*[1], *Balammal* v. *Palandi Naidu*[2] and *Doraiswami Thevan* v. *Lakshmanan Chettiar*[3] and we consider that this qualification must be accepted. If a plaintiff in his plaint or a witness in the witness-box makes some scandalously defamatory statement which has no reference whatever to the matter, it is difficult to see on what legitimate ground the aggrieved person should be denied a remedy. Considerations of public policy with regard to the administration of justice—we refer to the necessity for freedom of expression for a party, witness or counsel—surely cannot be carried to this extent. It is one thing to give absolute privilege to statements which have some reference to the inquiry and another thing to do so in the case of statements which are entirely irrelevant. We hold that in a civil action for defamation there is absolute privilege for a statement made in a pleading provided that the statement has reference to the inquiry.

It is now necessary to decide whether the statement complained of in the appellants' plaint has reference to their case. Rightly or wrongly they complained that the respondents had endeavoured to ruin their business, that they had done everything in their power to this end, including the adoption of a fraudulent get-up. Their course of conduct had relevancy to the inquiry ; and therefore the charge of interception of the appellants' business correspondence was not irrelevant. As a matter of fact, the evidence shows that they did complain to the postal authorities about interference with their correspondence, and that the postal authorities wrote to the appellants saying that necessary action had been taken to ensure and safeguard transmission of their articles passing through the Masulipatam Post Office. In deciding a question of this nature the Court should not take a too restricted view of what is pertinent. In the language of Bramwell, J., the words " having reference to the inquiry " ought to be given a very wide and comprehensive application. We hold that the statement complained of by the respondents was not entirely irrelevant and therefore is privileged.

The result is that the appeal will be allowed with costs here and in the first appellate Court.

B.V.V. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HAPPELL.

S. Syeda Mahomed Rowther .. *Appellant** (*Defendant*)

v.

A. Shanmugasundaram Chettiar .. *Respondent* (*Plaintiff*).

Tort—Negligence—Claim for damages—Burden of proof.

While the lessee of a house was using it at any rate for a part of each year as a place of business for the storage and sale of fire works, the house was completely destroyed by fire following on an explosion. In a suit by the lessor for the recovery of damages,

1. (1886) I.L.R. 10 Mad. 28 (F.B.).
2. (1938) 2 M.L.J. 340.
3. (1932) 38 L.W. 240.

*S. A. No. 1092 of 1941. 2nd December, 1942.

Held, though as a general rule the burden of proof in an action for damages for negligence rests primarily upon the plaintiff, there are exceptions to this rule; such as cases to which the maxim *res ipsa loquitur* applies, cases in which the fact of an accident is itself *prima facie* evidence of negligence, and in which there is a duty cast on the defendant to take special care. A duty to take special care is cast on the defendant when the things which he keeps are particularly dangerous, such as fire works. Where therefore the fact that the fire broke out in the lessee's premises is not disputed the burden is on the lessee to show that the fire was not due to his negligence.

Appeal against the decree of the Court of the Subordinate Judge of Trichinopoly in A. S. No. 236 of 1940 preferred against the decree of the Court of the District Munsiff of Trichinopoly in O. S. No. 650 of 1937.

A. V. Narayanaswami Aiyar for Appellant.

R. Rajagopala Aiyangar for Respondent.

The Court delivered the following

JUDGMENT.—The appellant leased a house from the respondent, and at any rate for a part of each year he used the house as a place of business for the storage and sale of fire works. The house was completely destroyed by fire following on an explosion, and on a suit brought for the recovery of damages by the lessor the lower Courts have awarded him damages to the amount of Rs. 1,000.

The principal argument advanced in appeal is that the lower Courts wrongly placed the burden of proof on the appellant. It may be conceded that as a general rule the burden of proof in an action for damages for negligence rests primarily upon the plaintiff. But there are exceptions to this rule; such as cases to which the maxim *res ipsa loquitur* applies, cases in which the fact of an accident is itself *prima facie* evidence of negligence, and in which there is a duty cast on the defendant to take special care. A duty to take a special care is cast on the defendant when the things which he keeps are particularly dangerous, such as fire works. It is argued for the appellant that the maxim "*res ipsa loquitur*" will not apply to this case because it was not proved that the fire broke out in the house rented by the appellant. If that was so, no doubt different considerations would apply. It is clear, however, from the pleadings, the evidence, and the judgments of the lower Courts that the fact that the fire broke out in the appellant's premises was not in dispute. That being so, in my judgment it was in the circumstances of the case for the appellant to show that the fire was not due to his negligence.

There was, however, in this case evidence for the plaintiff which, if the burden of proof had been on him, would have been sufficient to shift the burden on to the appellant. The evidence and the report of the Inspector of Explosives given in other proceedings by the consent of parties was taken as evidence in the suit. The Inspector gave it as his opinion that the articles stored by the appellant were highly dangerous, that in all probability tartary was stored in the shop, and that from the force of the explosion and the distance to which an iron girder had been thrown it must be inferred that at least 5,000 lbs. of fire works had been stored, whereas the appellant's license was only for the storage of 1,000 lbs. In face of this evidence, apart from any other reason, it was clearly for the defendant to show that he had complied with the terms of his license and that he had not in any way been negligent. He did not show this at all. He merely said that he had locked up his shop that night; and he did not produce his accounts which would have shown the amount of explosives which on the night of the fire he had in the shop, although it would appear from his deposition in other proceedings and the extent of his business that he must have kept accounts. There can therefore be no doubt that the decision of the lower Court that the defendant was liable to pay damages to the appellant for the loss occasioned by the fire was correct.

It has been argued for the appellant that the damages have been assessed on a wrong principle. The argument is that the value of a house forty years old has been assessed as the cost of rebuilding that house on the date of its loss by fire. In fact, a reference to the judgment of the learned District Munsiff shows that damages were not assessed on any such basis. The District Munsiff has taken into account the age of the house and has made allowance for depreciation. There is conse-

quently no ground for interfering with the damages as assessed by the lower Courts. The second appeal is therefore dismissed with costs.

Leave to appeal refused.

K.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Grandhi Hanumantha Rao .. *Appellant** (*Plaintiff*)

v.

Yeduvaka China Ramu Naidu and others .. *Respondents (Defendants).*

Madras Agriculturists' Relief Act (IV of 1938), section 8, Explanation—Splitting of pre-existing liability into parts and execution of new contracts with different terms—Not a "renewal"—Clause in mortgage giving mortgagee right to appropriate payments to interest—Open payments—Presumption of appropriation.

If the total liability due on a pre-existing contract is split into two fresh liabilities differing from each other and from the original in their terms and a fresh contract is executed with reference to each of those parts, it is improper [in the absence of special circumstances such as existed in the case of *Sankara Iyer* v. *Yegappa Servai*, (1940) 2 M.L.J. 874] to treat either of the fresh contracts as a renewal of a part of the pre-existing liability.

Accordingly, where the amount of Rs. 6,566 due on an earlier promissory note was discharged by the execution of two documents, one a mortgage for Rs. 6,000 and the other a promissory note for Rs. 631, of which Rs. 566 was part of the amount due under the original promissory note and it was impossible to say how much principal and how much interest was included in each of the two documents and the documents carried different rates of interest and the two contracts also differed from one another in their terms and from the original promissory note, it is not practicable, nor is it desirable, to treat the two separate contracts as if they formed together a single debt renewing the previous liability. In scaling down the mortgage liability it is necessary to start with the principal of the mortgage only.

Held further: Where a term in the mortgage provides that where any sum of not less than Rs. 1,000 is paid towards the principal the mortgagee was to receive the same and after appropriating the interest due on the entire debt outstanding then the balance should be credited towards principal, a payment of Rs. 2,300 at a time when the interest accrued due was far in excess of that amount must be deemed to have been entirely appropriated to interest as on the date on which it was made and the debt scaled down accordingly.

Appeal against the decree of the Court of the Subordinate Judge of Vizagapatam in O. S. No. 64 of 1939.

P. V. Rajamannar for Appellant.

V. Govindarajachari for Respondents.

The Judgment of the Court was delivered by

Wadsworth, J.—The appellant was the plaintiff in a suit on a mortgage bond, Ex. A, executed on 22nd November, 1924, for a sum of Rs. 6,000. At the time of the execution of the mortgage the respondents were indebted to the appellant under a previous promissory note (Ex. B) on which a sum of Rs. 6,566 was due. On the date of Ex. A an endorsement of discharge was written on this earlier promissory note which recites that the promissory note amount of Rs. 6,566 has been paid by the execution of two documents, one the mortgage Ex. A for Rs. 6,000 and the other, a promissory note (Ex. I) for Rs. 631 of which Rs. 566 was part of the amount due under Ex. B. The lower Court applying Madras Act IV of 1938 to the debt has treated the mortgage Ex. A as a renewal of the promissory note Ex. B and has scaled down the debt with reference to the antecedent history of the promissory note.

It is objected in appeal that this cannot be done for the reason that the liability under the promissory note (Ex. B) was split into two separate debts, one the debt under the mortgage (Ex. A) and the other the debt under the later promissory note (Ex. I). It is argued that the integrity of the debt was thus broken and that on the authority of our decisions in *Ramasubbier* v. *Rama Iyer*[1] and *Venkateswaralu* v. *Venkataraju*[2] there can be no renewal when the whole debt is divided up into two separate debts. This contention is met by Mr. Govindarajachari for the respondent by

*Appeal No. 314 of 1941. 18th November, 1942.

1. (1941) 1 M.L.J. 39. 2. (1941) 1 M.L.J. 718.

relying upon the decision in *Sankara Iyer* v. *Yegappa Servai*[1]. That was a case in which there was a mortgage on which a considerable sum was due by way of interest and the mortgagee got the mortgagor to execute a promissory note for the amount of interest, an endorsement being made on the mortgage bond that this amount was received for interest. A suit was subsequently filed on the promissory note and a decree obtained and an application was made to scale down that decree under section 19 of Act IV of 1938. We held that the promissory note having admittedly been taken for the interest due on the mortgage bond, it must be taken to be a renewal of the previous liability to pay that interest and must be scaled down under section 8 as a debt for interest. The reason for that decision was that it was open to the creditor before he took this promissory note to file a suit separately for the interest on the mortgage bond and if instead of doing so, he follows the course of taking a promissory note by way of a voucher or additional security for the debt for interest, there is no real payment of interest and fresh advance such as was contended for. All that happens is that the creditor takes a fresh document for a separable portion of the debt due under the mortgage. We pointed out that if this promissory note in the circumstances of the case were to be treated as an entirely fresh contract, creditors would be enabled to defeat the provisions of the Act by getting their debtors to execute promissory notes for the interest due on mortgages.

Mr. Govindarajachari has argued that it follows from the decision in *Sankara Iyer's case*[1] that in any case where a fresh document is executed for a part of a pre-existing debt, that fresh document can be treated as a renewal of the part of the debt in which it originates ; at any rate, unless there is any change in the parties to the transaction. We do not regard the decision as laying down any such sweeping proposition. Ordinarily a renewal is a fresh contract between the same parties with reference to the same debt with the addition of interest accrued on that debt. If the total liability due on a pre-existing contract is split into two fresh liabilities differing from each other and from the original in their terms and a fresh contract is executed with reference to each of those parts, it seems to us improper in the absence of special circumstances such as existed in the case of *Sankara Iyer* v. *Yegappa Servai*[1], to treat either of the fresh contracts as a renewal of a part of the pre-existing liability. The explanation to section 8 contemplates the renewal or inclusion in a fresh document of a debt. We have gone so far as to read this provision as covering a case where a separable portion of the original debt—is included in a fresh document, the main debt subsisting. But we do not consider that this extension of the rule, if extension it be, can be treated as an authority for regarding as a renewal a partial inclusion of any portion of a pre-existing debt in one of several new contracts with different terms.

On the facts of the present case it is impossible to say how much principal and how much interest was included in each of the two documents. They carried different rates of interest and the two contracts differ from one another in their terms and from the original promissory note. It is not, in our opinion, practicable, nor is it desirable, to treat these two separate contracts as if they formed together a single debt renewing the previous liability. It has been contended that if an opportunity were given, the respondents might be able to show that the promissory note (Ex. I) represented only interest on the earlier promissory note (Ex. B) so as to bring the facts near to those of *Sankara Iyer's case*[1]. It seems to us apparent both from the endorsement on Ex. B and from the terms of the mortgage (Ex. A) and the later promissory note (Ex. I) that there was no such separation of interest and apportionment to one of the two documents such as has been suggested. We therefore conclude that in scaling down this mortgage debt it is necessary to start with the principal of the mortgage Ex. A.

Towards this mortgage there were five payments. Of these five, the first and the last purport to have been made towards principal and interest, the first being covered by an endorsement and the last by a letter (Ex. E) which according to its terms is to be treated as equivalent to an endorsement until the actual mortgage

1. (1940) 2 M.L.J. 874.

bond was available for making an endorsement thereon. About the other three payments, there is no dispute since they were all clearly made towards interest. The appellant contends that having regard to the terms of the mortgage bond, these two disputed payments of Rs. 1,000 and Rs. 2,300 must necessarily have been appropriated in the first instance towards interest. The relevant clause in the bond runs as follows :

"If we pay at any time a sum of not less than Rs. 1,000 towards the said principal, you shall receive the same and after appropriating the interest due on the entire debt outstanding then the balance should be credited towards principal."

It has been contended for the respondents that having regard to the original Telugu words of this passage, it must be deemed to do no more than to give to the mortgagee an option to appropriate payments of Rs. 1,000 and more first towards interest. We cannot accept this contention. It seems to us that there was embodied in the mortgage bond a clear agreement between the parties that payments of Rs. 1,000 and more should be appropriated firstly towards interest in the manner indicated. It has been pointed out by Mr. Rajamannar for the appellant that this clause was as much in the interests of the debtors as of the creditor, for arrears of interest were under the terms of the mortgage to carry interest at an enhanced rate. We are of opinion that there was a clear stipulation in the mortgage as to the way in which such payments should be appropriated and the effect of such a payment in the light of this stipulation must be without any further act on the part of the creditor that the payment would necessarily be appropriated in the manner indicated in the covenant. A similar view has been taken by a Bench of this Court in *Kruttiventi Perraju* v. *Sabbella Bapireddi*[1] and also in *Gopinath Singh* v. *Hardeo Singh*[2], where a payment in such circumstances was treated as a payment of "interest as such" for the purpose of section 20 of the Limitation Act. It seems to us therefore clear that the payment of Rs. 1,000 must to the extent of Rs. 31-8-0 be deemed to have been appropriated as soon as it was made towards interest and the payment of Rs. 2,300 made in 1936 being less than the amount of interest then outstanding must be deemed to have been entirely appropriated to interest as on the date on which it was made. Applying the provisions of the Act to the debt in the light of this finding, it follows that the plaintiff is entitled to the amount which he has claimed in his plaint.

The appeal is therefore allowed with full costs in both Courts and the plaintiff will have a decree for the amount claimed in the plaint with interest on Rs. 5,031-8-0 at 6¼ per cent. till date fixed for payment and subsequent interest on the aggregate amount at six per cent. Time for redemption three months.

K.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Pasupuleti Venkata Subbayya .. *Appellant** (*Accused-Prisoner*).

Indian Penal Code (XLV of 1860), section 75—Sessions Judge failing to refer to previous convictions of accused—Duty of Judge in the circumstances.

The Criminal Rules of Practice require that magistrates and judges should append to their judgments a list of previous convictions of the accused.

Where the Sessions Judge referred only to one previous conviction, whereas it appeared clear from the fact that the previous conviction was one under section 75, Indian Penal Code, that there were other previous convictions,

Held, that the Sessions Judge should have included those previous convictions in his charge under section 75 and got the accused to plead to them and should then have set them out in a tabular form at the end of his judgment.

Appeal against the order of the Court of Session of Kistna Division at Chilakalapudi in C. C. No. 5 of 1942.

Appellant not represented.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

---

1. (1926) 99 I.C. 694.
2. (1909) I.L.R. 31 All. 285.

*Crl. Appeal No. 311 of 1942. 1st September, 1942.

The Court delivered the following

JUDGMENT.—The appellant was convicted by the Sessions Judge of Kistna of an offence punishable under section 379, Indian Penal Code and sentenced to three years' rigorous imprisonment.

The appellant was tried by jury. It was doubted at the time of admission whether the pointing out of the complainant by the accused was admissible in evidence against him; but in view of the Full Bench decision of this Court in *Emperor* v. *Ramanuja Iyengar*[1], there can be no doubt that if a complainant is discovered as a result of a statement made by the accused, that statement is admissible; for the material fact discovered as a result of that statement is the theft from the complainant.

The appellant was sentenced to three years' rigorous imprisonment because of a previous conviction. The accused admitted the previous conviction, but stated that it had been set aside in appeal. The learned Sessions Judge seems to have disregarded that statement altogether without any inquiry. If his statement had been true, then there would have been no proved previous convictions, and section 75, Indian Penal Code, should not have been applied, and the sentence of three years' rigorous imprisonment would have been excessive. I understand that the practice is that when a sentence has been reversed in appeal, an indorsement is made on the calendar itself. The absence of an indorsement in this case therefore indicated that there had been no reversal in appeal. I further understand, moreover, that there was no reversal in appeal and that the reason why the appellant was able to commit the crime he did when he should have been in jail was that he escaped from legal custody just before the offence was committed.

The learned Sessions Judge makes no reference at all to any of the convictions prior to the previous conviction to which I have referred in the above paragraph. Clearly, the number of the previous convictions is a circumstance to be taken into consideration in determining the sentence. Moreover, the Criminal Rules of Practice require that Magistrates and Judges should append to their judgments a list of previous convictions; but the learned Sessions Judge has made no attempt to do this. He has referred only to one previous conviction, whereas it appears clear from the fact that the previous conviction was under section 75, Indian Penal Code, that there were other previous convictions. In all probability, these previous convictions were referred to in the calendar that was filed in the Sessions Court. The learned Sessions Judge should have included those previous convictions in his charge under section 75, Indian Penal Code and got the accused to plead to them, and should then have set them out in a tabular form at the end of his judgment.

In the circumstances the sentence is not excessive. The appeal is dismissed.

K.C. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Kandaswami Goundan and others .. *Appellants** (*Petitioners*)

v.

Subbarama Ayyar and others .. *Respondents* (*Respondents*).

Receiver—Mortgage action—Property purchased by him at a sale held by Official Receiver—Public policy violated—Purchase invalid.

Where a person who had been appointed a receiver in a mortgage action was himself the purchaser of the property at a sale held by the Official Receiver, on the question whether it was not against public policy to permit the receiver to purchase the property,

Held, that it would be against public policy that a receiver who had special means of knowing, during the course of his receivership, the peculiarities and value of the property should take advantage of such knowledge; and that there was no distinction between a Court-sale and a sale by the Official Receiver.

Subramaniam v. *Damavarapu Reddi*, (1935) 68 M.L.J. 597, followed.

---

1. (1934) 68 M.L.J. (Supp.) 73 : I.L.R. 58 Mad. 642 (F. B.).

*A. A. O. No. 480 of 1940 and C.R.P. No. 2244 of 1939. 8th December, 1942.

Appeal against the order of the District Court of Coimbatore dated 15th March, 1940 and made in A. A. O. No. 55 of 1939, preferred against the order of the Court of the Subordinate Judge of Coimbatore dated 10th February, 1939, and made in I.A. No. 1005 of 1937 in I. P. No. 23 of 1936, etc.

N. Somasundaram for Appellants in C. M. A. No. 480 of 1940.

C. D. Venkataraman for Respondents in C. M. A. No. 480 of 1940 and Petitioner in C. R. P. No. 2244 of 1939.

R. Sadasivan and *P. S. Kailasam* for Respondent in C. R. P. No. 2244 of 1939.

The Court delivered the following

JUDGMENT.—The Official Receiver of Coimbatore held a sale of certain lands, which were purchased by the petitioner in C. R. P. No. 2244 of 1939, who is a respondent in C. M. A. No. 480 of 1940. Prior to the sale the insolvent had put in an application to scale down the debt under Act IV of 1938 and some creditors, who are the appellants here, put in an application under section 68 of the Provincial Insolvency Act to set aside the sale. The learned Subordinate Judge set aside the sale on three grounds. One was that the purchaser, the 7th creditor, had been appointed a receiver of the property in a mortgage action and that it was against public policy to permit a receiver to purchase the property. The second ground was that the scaling down application was pending and that the probable result of that application would be a considerable scaling down of the mortgage debt, with the result that the lands would fetch a very much higher price. The third ground was that there was no proper notice to the other creditors. In appeal, the learned District Judge thought that although in certain cases a receiver ought not to be allowed to bid, there could be no objection in the present case. On the other two points he thought that no decision could properly be arrived at in the absence of evidence which had not been admitted by the Subordinate Judge. He therefore allowed the appeal and remanded the application for fresh disposal. The appeal is against the order of remand by the District Judge ; and the revision petition is against the order of the Subordinate Judge, it being contended in revision that section 23 of Act IV of 1938 did not apply and that therefore the sale could not be set aside.

The learned District Judge referred to a decision in *Subramaniam* v. *Damavarapu Reddi*[1], in which it was held that as a matter of public policy a receiver should not be allowed to bid in an auction sale held in execution of a decree arising out of a mortgage in which he had been appointed a receiver and that if he did bid, the sale should be set aside on that ground alone without any inquiry as to whether any person had been prejudiced by his purchase. The learned District Judge sought to distinguish that case from the present case by pointing out that *Subramaniam* v. *Damavarapu Reddi*[1], related to a Court-sale in execution of a decree, whereas in the present case the sale was by the Official Receiver. I can see no distinction between a sale by a Court and a sale by the Official Receiver. The principle underlying the decision in *Subramaniam* v. *Damavarapu Reddi*[1] had no connection with the nature of the selling agency. It asserted that it was against public policy that a receiver, who had special means of knowing during the course of his receivership the peculiarities and the value of the property, should be allowed to take advantage of that knowledge at a sale. That principle applies equally to the present case. It is pointed out that in that case the receiver continued as receiver right up to the date of the sale, whereas in the present case he ceased to be a receiver with the adjudication of the judgment-debtor. Even so, I doubt whether a distinction can be drawn. No case has been pointed out to me in which the general principle laid down in *Subramaniam* v. *Damavarapu Reddi*[1] has been departed from. It must apply to all cases where a receiver has been appointed, unless by some other principle a particular class of cases are excepted. Moreover, as the Official Receiver had a right only in the equity of redemption (because the mortgagees continued to

1. (1935) 68 M.L.J. 597.

hold the security for their debts), the respondent continued to be receiver up to the date of the sale and even thereafter.

The appeal is therefore allowed, the order of the District Judge set aside and that of the Subordinate Judge restored with costs here and in the District Court. It would follow that the Civil Revision Petition, which is against the order of the Subordinate Judge, has also to be dismissed.

As there has been much delay during the pendency of the proceedings in the lower appellate Court and in this Court, the learned Subordinate Judge should expedite the proceedings now pending before him.

K.C. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNASWAMI AYYANGAR AND MR. JUSTICE KUNHI RAMAN.

S. S. Sv. Kasiviswanathan Chettiar .. *Appellant** (*1st Deft.*)

v.

S. S. S. Sv. Somasundaram Chettiar and others .. *Respondents* (*Plff. & Defts. 2 and 3*).

Custom—Nattukottai Chettiars—Adoption—Secular motives as predominant—Death of widow—Adoption to deceased male by another member of family—Validity.

Secular motives are predominant in adoptions effected among Nattukottai Chetties who often possess considerable property and desire to direct its devolution along approved channels while at the same time ensuring the performance of religious rites to which as Hindus they also attach value. On the evidence adduced in the present case,

Held, that in the circumstances of the case a valid custom had been proved permitting an adoption made to a person after his death and the death of his widow, by his father.

Appeal against the decree of the Court of the Subordinate Judge of Sivaganga, dated 21st November, 1940, in O. S. No. 11 of 1939.

B. Sitarama Rao and *M. Ranganatha Sastri* for Appellant.

K. Rajah Aiyar, *V. Ramaswami Aiyar* and *V. Seshadri* for Respondents.

The Judgment of the Court was delivered by

Krishnaswami Ayyangar, J.—Kasiviswanathan Chettiar is the appellant in this appeal. He was the first defendant in the suit out of which it has arisen. That suit was filed by the first respondent for partition and recovery of a half share in the joint family properties in the possession of the appellant. There were two other defendants who are respondents 2 and 3 here. The second defendant is a purchaser of a half share of a house which originally formed part of the joint family property and the purchase was from the first defendant. The third respondent is the minor son of the first respondent.

The plaintiff-respondent claims that he has been duly adopted on 20th April, 1923, to one Sevugan Chetty who was the elder brother of the appellant. Sevugan and Kasiviswanathan are the sons of Sevugan Chetty whom we shall call Sevugan the senior. The adoptive father Sevugan junior had died on 27th March, 1908, leaving a widow Meyyammai who died in 1918. The adoption would thus appear to have been made after the death of the adoptive parents and was brought about by Sevugan (senior) with the consent of the appellant also. Under the ordinary Hindu law such an adoption cannot be upheld. The only person who can make an adoption is the adoptive father if alive and after his death his widow and none other. But it is said that among the Nattukottai Chetti community to which the parties belong, there is a custom permitting an adoption to be made to a person after his death and the death of his widow by the father or other pangalis of his. This custom has been found by the Subordinate Judge and accordingly he has given a decree to the first respondent as prayed. The main question which arises in the appeal is as to whether the evidence adduced in the case is sufficient to make out the custom.

---

*Appeal No. 400 of 1940. 10th December, 1942.

Before we refer to the evidence of custom, it is necessary to refer to certain other admitted facts. On the date of the adoption, *viz.*, 20th April, 1923, a deed of adoption called a *muri* which is the name by which such deeds are known in the community was brought about and it runs thus :

> " As saffron water has been partaken to the effect that Palaniappan *alias* Somasundaram (first respondent) son of Subrahmaniam Chetti Yegappan of Devakottai, shall be as a son born to his ownself to Sevugan Chetty (junior) Sevathan of Ilayathakudi in Shanmuganathapuram Keelavasal nadu and of Peru Maruthu in Kulasekharapuram, Sevathan's Kari (proprietary right) bhoomi (land). . . . . . Devadanam (endowment to temple) . . . . . Somasundaram (first respondent) shall hold and enjoy, stridhanam, bhoodanam (landed property) and all of Meyyammai . . . . . and shall do all the sadangus (ceremonies) . . . . . I wrote this saffron water muri."

The document is in the handwriting of the appellant and was signed by him as the first of the signatories to it. The second signature is that of Sevugan (senior) who has signed himself as Subrahmaniam Chetty Sevathan. The third signature is that of Yegappan the natural elder brother of the first defendant, adopted son. The fourth signature is that of Karuppan Chetty who is the maternal uncle of Sevathan's (junior's) wife. The last signature is that of one Lakshmanan Chetty who is a brother of the first respondent's mother in the natural family. It would thus seem that not only the appellant and his father were parties to the adoption but the near relations of the family had taken part in having the adoption made. This was followed in 1925 by a division effected by Sevugan (senior) of certain villages and house sites between the appellant and the first respondent. In this division the appellant got for his share a village and certain sites and the first respondent another village and some other sites.

On 11th February, 1925, a most important document came into existence showing the position of the first respondent as conceived by Sevugan (senior) and the appellant. This document is Ex. A termed a yadast, and it provides for the properties of the family being kept undivided for a period of seven years and directs a division of the same in equal shares between the appellant and the first respondent thereafter. A few days later on 20th February, 1925, Sevugan (senior) died. The appellant and the first respondent seem to have got on amicably together as members of the same family for a number of years thereafter. In fact, we find that on 21st July, 1926, a garden belonging to the family was divided, the appellant taking the southern half and the first respondent the northern half. Quarrels however arose between the parties sometime later, but we are not concerned either with the actual cause of the quarrel or with the subject-matter thereof. The present suit was instituted on 4th April, 1936, for a partition and recovery of the remaining properties of the family consisting of a house and a large amount of money remaining in the hands of the appellant in the shape of cash and outstandings. Before we proceed to consider the question of custom we must mention the significant circumstance that in regard to the properties already divided between the parties no question whatever is raised.

As we have already observed the sole question for determination is whether the custom has been made out.. The proof adduced consists purely of oral evidence. No documents showing that adoptions of the kind in question have been made in the community have been filed nor has there been any occasion in which the custom has come up before Courts and been recognised. We may also observe that the evidence adduced on behalf of the first respondent is rather meagre in quantity consisting as it does of four witnesses and nine instances two of which alone can be said to relate to old adoptions.

* * * *

We should not ordinarily be inclined to accept the evidence as sufficient to prove the custom but the case of the plaintiffs derives considerable support from the evidence adduced by the appellant himself.

D. W. 1 Ramanathan Chetty after describing the way in which adoptions among Chetties take place made the statement that when the adoptive father and mother are dead no adoption can be effected. But in answer to a question

immediately put by the Court he deposed,

"When a father had a son and a daughter-in-law and if both these died the father can make an adoption to the deceased son in case the father has no other sons alive on the date of the adoption. Other pangalies cannot make an adoption to a deceased pangali."

This is undoubtedly an admission which goes far to prove the custom upon which the plaintiff has relied. In fact this answer implies that the adoption of the plaintiff was sanctioned by the custom inasmuch as it was made by Sevathan (senior), after the death of his son and daughter-in-law. The witness however adds that no adoption can be made to a man and his wife if they die without leaving a daughter or daughters. He also deposed to what apparently was within his own knowledge when he stated that a daughter is competent to make an adoption to her deceased parents. The witness has however given no instances of adoption of this kind.

D.W. 3 Mahalingam Chetty makes the statement that if the adoptive parents are dead a brother of the deceased cannot make an adoption to the deceased. A senior paternal uncle or a junior paternal uncle can adopt a boy to the deceased brother when he has died leaving a daughter. D.W. 4 Somasundaram deposed that an adoption can be made when both the parents die leaving only a daughter but not in other cases and he illustrates his evidence by giving two instances. He states that one Kasi Chetty of Tanicha Oorani was adopted when both the adoptive parents were dead but had left a daughter. He also says that after the death of Kadiresan and his wife an adoption was made to them by his elder brother's son. He adds that Kadiresan had left a daughter.

The evidence of the witnesses examined for the appellant undoubtedly goes to make out that there is a custom in the community which permits adoption being made to a person after the death of the adoptive parents. Strange as this may sound, it has to be remembered that secular motives are predominant in adoptions effected among Nattukottai Chetties who more often than not possess considerable property and desire to direct its devolution along approved channels while at the same time ensuring the performance of religious rites to which as Hindus they also attach value. It is true that some of the witnesses examined for the defendants say that such adoptions are permitted only if the deceased parents had left a daughter. The reason for this qualification is explained by D.W. 3 Mahalingam by saying that the adoption is made in order to make provision for the daughter being duly given in marriage and for the sadangu and seer murai being properly performed afterwards. This explanation when analysed merely comes to this that when there is a daughter and an adoption is made, the adopted son would in the natural course of events give the girl in marriage and also observe the usual conventions of the community in regard to the performance of the subsequent ceremonies, etc. In fact this witness himself admits that to his knowledge an adoption has been made to a person after the death of himself and his wife leaving no daughter behind. To the same effect is the evidence given by P.W. 1 when he referred to the adoption made by him in 1929 to his own deceased son who had died leaving no daughter.

Taking the evidence as a whole, we are not prepared to say that the learned Judge has come to an erroneous conclusion on the question of the custom. It is not without significance that all through, Sevugan (senior), the appellant himself and all other relations of the parties have acted on the footing that the adoption is valid. The disputes would not have arisen but for some quarrels between the appellant and the respondents sometime before suit. In view however of the scanty evidence on which the finding has been arrived at, we desire to qualify our decision by stating as the Privy Council did in *Chimanlal* v. *Hari Chand*[1] that the effect of the decision is to be confined to the particular circumstances of the present case and that it should not be regarded as a satisfactory precedent if in any future instance among other members of the community fuller evidence regarding the existence or non-existence of the alleged custom should be forthcoming.

There is a slight alteration which has to be made in clause 3 of the decree passed by the lower Court and to this alteration the respondents have raised no objection.

---

1. (1913) L.R. 40 I.A. 156 : I.L.R. 40 Cal. 879 at 890 (P. C.).

Clause 3 of the decree shall run as follows :

"That plaintiff is entitled to an account of the family outstandings and that such an account shall be taken, the accounting party being the appellant."

Subject to this modification the appeal fails and is dismissed with costs of the first respondent, one set.

B.V.V. ——— *Decree modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNASWAMY AYYANGAR AND MR. JUSTICE KUNHI RAMAN.

Venkamamidi Balakrishnayya .. *Appellant** (*2nd Respondent*)

v.

Nannapaneni Linga Rao .. *Respondent* (*Petitioner-Decree-holder*).

Civil Procedure Code (*V of 1908*), *Order 34, rule 5—Final mortgage decree passed during pendency of appeal against preliminary decree—No amendment of final decree after passing of appellate decree—Appellate decree when executable.*

Res judicata—*Judgment-debtor remaining* ex parte *in earlier execution petition—Objection as to jurisdiction deemed to be waived.*

By a preliminary decree in a mortgage suit passed by the Subordinate Judge of Bapatla the fourth defendant who was in possession of some of the mortgaged properties was exonerated from the decree. The plaintiff preferred an appeal to the High Court which modified the decree in certain particulars on 8th May, 1934. As a result the fourth defendant and the property in his possession were declared liable for the mortgage amount subject to the condition that he should be paid the value of the improvements effected by him. While the appeal was pending in the High Court the decree-holder applied to the Bapatla Sub-Court for a final decree being passed and such a decree was actually passed on 3rd October, 1927, by which the position of the fourth defendant was in no way affected. The decree-holder did not take any steps either to obtain a fresh final decree incorporating the modifications made by the High Court or to have the final decree already passed amended so as to embody them into it.

In the meantime the territorial jurisdiction in respect of the properties in suit was transferred from the Bapatla Sub-Court to the Sub-Court created at Tenali with effect from 1st August, 1930. But as the mortgage suit had been disposed of by the passing of both the preliminary and the final decrees therein and no execution proceedings had been instituted, the lists of cases transferred to the Tenali Court did not include the mortgage suit or any proceedings connected therewith.

In an execution petition filed in 1937 in the Tenali Sub-Court claiming relief against the legal representative of the fourth defendant in accordance with the appellate decree, though notice was issued under Order 21, rule 22 of the Code and duly served upon him, the legal representative of the fourth defendant did not appear and was accordingly declared *ex parte*. In the next execution petition filed in 1939 objections as to the executability of the decree and the jurisdiction of the Tenali Court were raised by the legal representative of the fourth defendant.

Held, (*i*) where an appeal has been preferred from the preliminary decree in a mortgage suit the decree passed by the appellate Court should be deemed to be the preliminary decree which has to be made final under Order 34, rule 5 before it can be regarded as executable.

(*ii*) Although the Tenali Sub-Court had no jurisdiction to execute the decree [vide *Ramier* v. *Muthukrishna Ayyar*, (1932) 62 M.L.J. 687 : I.L.R. 55 Mad. 801 (F.B.)] the absence of an order of transfer is merely an irregularity in the assumption of jurisdiction by the Tenali Sub-Court when proceedings were commenced in it, but that objection not having been taken in the first instance the fourth defendant's legal representative must be held to have waived it.

(*iii*) Accordingly the order for sale passed by the Tenali Sub-Court in the 1937 execution petition cannot be considered to be null and void and therefore operates as *res judicata*.

Appeal against the order of the Court of the Subordinate Judge of Tenali, dated 8th November, 1940 and made in E. P. No. 18 of 1940 in O. S. No. 63 of 1922 on the file of the Court of the Subordinate Judge of Bapatla.

T. Rajagopalan for Appellant.

G. Chandrasekhara Sastri for Respondent.

The Judgment of the Court was delivered by

Krishnaswamy Ayyangar, J.—This appeal arises out of an order passed by the Subordinate Judge of Tenali in execution of a decree passed by the Subordinate Judge of Bapatla in O. S. No. 63 of 1922 on his file. The appellant is the legal representative of the fourth defendant in the suit which resulted in the decree now sought to be executed. The respondent is the legal representative of the decree-

*A. A. O. No. 284 of 1941. 23rd November, 1942.

holder. The appellant's contention in short was that there was no valid executable decree so far as he is concerned. This contention having been overruled by the Subordinate Judge he has appealed to this Court against his order.

In order to appreciate the question that arises for consideration in this appeal it is necessary to state a few facts. O.S. No. 63 of 1922 was instituted by one Lakshminarayana to recover a sum of Rs. 9,282-5-4 being the balance due on a mortgage dated 1st April, 1910, executed in his favour by the husband of the first defendant in the suit. There were numerous other defendants in possession of portions of the mortgaged properties under alienations effected subsequent to the mortgage. The predecessor-in-title of the appellant was the fourth defendant. By the preliminary decree passed by the Subordinate Judge of Bapatla the fourth defendant was exonerated from the decree. The plaintiff preferred an appeal to this Court in A. S. No. 405 of 1925. On 8th May, 1934, this Court (Ramesam and Curgenven, JJ.) modified the decree of the lower Court in certain particulars. Clause 3 of the appellate decree which is the only clause relevant for the present purpose is as follows :

"That the decree of the lower Court in so far as it relates to defendants 4, 7, 29, 38 and 36 as to Ex. XIII, be, and hereby is, set aside and the properties forming items 1, 13, 12, 9 and 6 mentioned in the schedule attached to the decree of the lower Court, with which the said defendants 4, 7, 29, 38 and 36 as to Ex. XIII are severally concerned be sold only after paying for the improvements effected by the said defendants on the sites."

The result was that the appellant's predecessor-in-title, namely, the fourth defendant and the property in his possession were declared liable for the mortgage amount subject to the condition that he should be paid the value of the improvements effected by him. While the appeal was pending in this Court the decree-holder applied to the Bapatla Sub-Court for a final decree being passed and such a decree was actually passed on 3rd October, 1927. By this decree which followed the declarations contained in the preliminary decree of 19th December, 1924, the position of the fourth defendant was in no way affected. It is also common ground that the decree-holder did not take any steps either to obtain a fresh final decree incorporating the modifications made by the High Court or to have the final decree already passed amended so as to embody them into it. This omission furnishes the ground upon which the appellant rests his contention that there is no executable final decree in favour of the decree-holder and the order of the learned Judge is therefore wrong. In his execution petition E. P. No. 18 of 1940 which has given rise to this appeal the respondent has mentioned under column 1 under heading "Number of suit" (1) Bapatla Sub-Court file O. S. No. 63 of 1922, (2) Madras High Court file A. S. No. 405 of 1925. In column 4 headed "Date of decree" he has mentioned 8th May, 1934, as the date of the decree of the High Court in A. S. No. 405 of 1925. The contents of these columns suggest that what the respondent was seeking to execute was the decree of the High Court, which, as we have said, had resulted in certain modifications being introduced into the preliminary decree passed by the Bapatla Sub-Court. When notice of this execution petition went to the appellant, he filed a counter-petition raising the contention that the decree-holder should first obtain a final decree by the Bapatla Sub-Court and get it transferred to the Sub-Court at Tenali before he can seek execution.

A further complication arises on account of the fact that territorial jurisdiction in respect of the properties in suit was transferred from the Bapatla Sub-Court to the new Subordinate Judge's Court created at Tenali with effect from 1st August, 1930. The creation of the Tenali Subordinate Judge's Court was sanctioned under G.O. No. 2529 Law General Department, dated 16th June, 1930, published in the *Fort St. George Gazette*, on 24th June, 1930. Lists of the original suits, execution petitions, insolvency petitions and miscellaneous petitions relating to the transferred jurisdiction were made and the concerned proceedings were transferred to the Tenali Subordinate Judge's Court by order of the District Judge. But due possibly to the fact that O. S. No. 63 of 1922 had already been disposed of by the passing of both the preliminary and the final decrees therein and the fact that no execution proceedings had been instituted, the lists aforesaid did not include this

suit or any proceedings connected therewith. The position therefore was that the Tenali Subordinate Judge's Court which has passed the order now under appeal acquired territorial jurisdiction over the mortgaged properties, but the transfer of business made to it from the Bapatla Subordinate Judge's Court left out the suit with which we are concerned. On this circumstance is based the second contention of the appellant that the Tenali Subordinate Judge's Court has no jurisdiction to execute the decree as ruled in *Ramier* v. *Muthukrishna Ayyar*[1].

Prima facie both the contentions of the appellant appear to be sound and supported by authority. It is difficult to maintain the proposition that the decree of the High Court can be regarded as a final decree capable of execution. The correct view in a case where an appeal has been preferred from the preliminary decree is, as held in *Gajadhar Singh* v. *Kishan Jivanlal*[2] that the decree passed by the appellate Court should be deemed to be the preliminary decree which has to be made final under Order 34, rule 5 before it can be regarded as executable. It is not necessary for the present purpose to consider whether the right course for the decree-holder is to apply for a fresh final decree or to have the final decree already passed suitably amended by incorporating the modifications, as he has done neither. The Subordinate Judge has been able to persuade himself on a construction of the High Court's decree, that it is and was intended to be a final decree. But this view is plainly unsustainable and indeed it has not been supported before us. The second point also appears to be concluded in the appellant's favour by the Full Bench decision in *Ramier* v. *Muthukrishna Ayyar*[1] to which we have referred.

The respondent's advocate has however sought to get over these difficulties by urging (1) that it is not open to the appellant to plead that there is no executable decree by reason of earlier orders made by the Tenali Subordinate Judge's Court, and (2) that those orders also debar him from contending that the Tenali Sub-Court had no jurisdiction to direct the execution of the decree. In other words, the appellant's contentions are met by the plea of *res judicata*.

It would seem that the first execution petition, namely, E. P. No. 43 of 1931 was filed in the Tenali Sub-Court for the purpose of having the decree executed against the parties other than the appellant and his predecessor-in-title which parties were bound by the preliminary and final decrees passed by the Bapatla Sub-Court. In this execution petition some of the mortgaged properties were sold and the amount realised went in part satisfaction of the decree. As the appellant was not a party to this execution petition, the proceedings therein have no relevance to the present appeal.

The first execution petition in which relief was prayed for against the appellant was E. P. No. 57 of 1937 filed on 2nd April, 1937. The decree-holder asked the Court to proceed against the appellant and certain other judgment-debtors for the realisation of a sum of Rs. 14,886-13-11 and costs by sale of their properties as per the directions contained in the decree of the High Court in A. S. No. 405 of 1925. The appellant was made the third respondent in place of his predecessor-in-title, namely, the fourth defendant. On 14th July, 1937, the Court directed the issue of notice under Order 21, rule 22 to the appellant amongst others. Though he was served, the appellant did not appear and was accordingly declared *ex parte*. On 6th January, 1939, the Court refused execution against the seventh item of the properties sought to be proceeded against—with this item the appellant has no concern—but as regards the rest directed the decree-holder to file the sale papers on or before 18th January, 1939. On this date time for the filing of the sale papers was extended till 26th January, 1939, when the execution petition was withdrawn and dismissed as not pressed. The order passed on 6th January, 1939, is clearly an order directing execution to proceed on the footing that the decree was one capable of being executed by the Court in which the execution petition had been filed.

The next execution petition, E. P. No. 61 of 1939, was filed on 28th August, 1939, the appellant being the second respondent therein, notice was directed to issue against

1. (1932) 62 M.L.J. 687: I.L.R. 55 Mad. 801 (F.B.).
2. (1917) I.L.R. 39 All. 641 (F.B.).

the respondents. but the appellant refused to accept service. The petition contained the prayer that the values of the superstructures on the several properties in which the judgment-debtors were interested should be determined in order to enable the decree-holder to pay the several sums payable under this decree and have the respective properties sold through Court. Schedules showing the properties in which the several defendants were interested were called for and also proof of the values of those properties. The information called for was furnished and sale papers were also filed for settlement of the proclamation. On the 15th January, 1940, the Court directed the office to check the papers. The office found that the encumbrance certificates had not been filed. When the petition was called on 19th January, 1940, there was no appearance on behalf of the decree-holder, nor had the encumbrance certificates been filed. The execution petition was thereupon dismissed. So far as this petition is concerned, it does not appear that there was any order made by the Court while it was pending, which can be said to involve a decision that the decree was executable. It follows that there is nothing in the proceedings connected with this execution petition which can be said to give rise to the plea of *res judicata.*

But as we have already pointed out, the order of the 6th January, 1939, in E. P. No. 57 of 1937 must be deemed to involve a determination by the Court that the decree in question was capable of execution. The order was made after notice to the appellant issued under Order 21, rule 22, calling upon him to show cause why the decree should not be executed against him. He did not appear to show such cause. Following the decision in *Lakshmanan Chettiar* v. *Palaniappa Chetti*[1], we must hold that the order operates as *res judicata,* notwithstanding that there was no express decision on the point and the execution petition was ultimately dismissed as not pressed. The principle to be applied in such cases is that laid down in *Mungal Pershad Dichit* v. *Girija Kant Lahiri*[2] extracted in the judgment of Devadoss, J., in the above case. It is that,

> " although the execution of a decree may have been actually barred by time at the date of an application made for its execution, yet, if an order for such execution has been regularly made by a competent Court having jurisdiction to try whether it was barred by time or not, such order, although erroneous, must, if unreversed, be treated as valid."

The learned Judges support themselves by these observations in laying down the principle that when an order for execution of a decree is made, the implication is that the appellant has a right to execute the decree ; that it is an executable decree, that it is not barred by limitation and that the judgment-debtor is liable to satisfy it. In *Ramaswami Reddi* v. *Rangamannar Iyengar*[3], Sankaran Nair and Ayling, JJ., applied the same principle to a case where the decree-holder sought to execute a preliminary decree which had not been made final. When the decree-holder sought to execute it notice of the execution petition went to the judgment-debtors, but the latter did not raise the objection, that the decree, being a preliminary decree was not executable. Thereupon the Court directed the properties to be sold. That order was not set aside and became final and it was held that it was thereafter not open to the judgment-debtors to contend that the decree was only a preliminary decree incapable of being executed. In *Subbarayadu v. Bapayya*[4], Madhavan Nair, J. as he then was, held that a previous *ex parte* order which raised a question about the executability of the decree operates as *res judicata* and the judgment-debtor cannot in a subsequent application raise the plea that the decree is not executable or that the previous application was barred by time.

But it is contended that the Tenali Sub-Court which made the order now under appeal had no jurisdiction either to execute the decree or to make the order sought to be pleaded as constituting *res judicata.* There can be no doubt that the Tenali Sub-Court cannot execute the decree unless the Bapatla Court which passed the decree had sent it to the Tenali Sub-Court for execution under section 39 of the Civil Procedure Code and if the objection had been taken by the appellant in the first instance, that is, in E. P. No. 57 of 1937, it should have prevailed. But now

1. A.I.R. 1928 Mad. 1052.
2. (1881) L.R. 8 I.A. 123 : I.L.R. 8 Cal. 51 (P.C.).
3. (1914) 26 M.L.J. 255.
4. A.I.R. 1927 Mad. 149.

after the order for execution which had been made in it though *ex parte* the objection to the jurisdiction cannot be sustained unless we can hold that it is not a case of a mere irregularity in the assumption or exercise of jurisdiction, as distinct from one of absolute want of jurisdiction. The leading case on the subject is *Ledgard* v. *Bull*[1] decided by the Privy Council in 1886. The same principle was reiterated in *Minakshi Naidu* v. *Subramania Sastri*[2]. In *Ledgard's case* the Judicial Committee observed as follows :

"When the Judge has no inherent jurisdiction over the subject-matter of a suit, the parties cannot, by their mutual consent, convert it into a proper judicial process, although they may constitute the Judge their arbiter, and be bound by his decision on the merits when these are submitted to him. But there are numerous authorities which establish that when, in a cause which the Judge is competent to try, the parties without objection join issue and go to trial upon the merits, the defendant cannot subsequently dispute his jurisdiction upon the grounds that there were irregularities in the initial procedure, which, if objected to at the time, would have led to the dismissal of the suit."

These observations were repeated in the later decision of the Board in *Minakshi Naidu's case*[2]. This principle has been applied by the Courts in India in great many cases of which it is sufficient to refer to *Gurdeo Singh* v. *Chandrikah Singh* and *Chandrikah Singh* v. *Rashbehary Singh*[3]. Mookerjee, J., after an examination of the Indian and the English authorities on the point elucidated the distinction in matters of jurisdiction in this way :

"A Court cannot adjudicate upon a subject-matter, which does not fall within its province as defined or limited by law ; this jurisdiction may be regarded to be essential, for jurisdiction over the subject-matter is a condition precedent to the acquisition of authority over the parties, and, if a Court has no jurisdiction over the subject-matter of the controversy, consent of the parties cannot confer such jurisdiction, and a judgment made without jurisdiction in such a case is absolutely null and void ; it may be set aside by review or appeal, or its nullity may be established, when it is sought to be relied upon in some other proceeding : *See* Hawes on Jurisdiction, pages 12-16 ; Hermann on Estoppel, section 110, and *Frankel* v. *Sutterfield*[4].

An entirely different class of questions, however, arises, when it is suggested that a Court in the exercise of the jurisdiction which it possesses, has not acted according to the mode prescribed by the Statute. If such a question is raised, it relates obviously, not to the existence of jurisdiction, but to the exercise of it in an irregular or illegal manner. This distinction between elements, which are essential for the foundation of jurisdiction and the mode in which such jurisdiction has to be assumed and exercised, is of fundamental importance, but has not always been sufficiently recognised."

After making these preliminary observations the learned Judge proceeds to observe :

"Although the objection that a Court is not given jurisdiction over the subject-matter by law, cannot be waived, *Colab Sao* v. *Chowdhury Madholal*[5], yet defects of jurisdiction arising from irregularities in the commencement of the proceedings, may be waived by the failure to take objection at the proper stage of the proceedings, *Harkeness* v. *Hyde*[6], *Jollaud* v. *Sprague*[7], *Rhode Island* v. *Massachussetts*[8].

To put the matter from another point of view, it is only when a Judge or Court has no jurisdiction over the subject-matter of the proceeding or action in which an order is made or a judgment rendered, that such order or judgment is wholly void, and that the maxim applies that consent cannot give jurisdiction ; in all other cases, this objection to the exercise of the jurisdiction may be waived, and is waived, when not taken at the time the exercise of the jurisdiction is first claimed, *Hobart* v. *Frost*[9], Black on Judgments, section 217."

We have therefore to see under which class the objection to jurisdiction here raised really falls ; and for this purpose we must consider whether the Tenali Sub-Court had jurisdiction over the subject-matter of the execution petition ; for this is the true test. There can be no doubt that after the transfer of territorial jurisdiction to the Tenali Sub-Court it is that Court that had the jurisdiction over the properties. Section 39 which empowers the Court which passed the decree to send it for execution to another Court, states that this procedure may be adopted if, the decree directs the sale or delivery of immovable property outside the local limits of the jurisdiction of the Court which passed it, that is to say, the transfer of the decree for execution to another Court is permitted if the Court in which the property directed to be sold or delivered is situated within the territorial jurisdiction of that other Court. We consider that the true effect of Section 39 is to recognise the transferee Court as having inherent jurisdiction, to sell or deliver properties situate within its territorial limits, but only that the jurisdiction is to be invoked by the machinery

1. (1886) L.R. 13 I.A. 134 : I.L.R. 9 All. 191 (P.C.).
2. (1887) L.R. 14 I.A. 160 : I.L.R. 11 Mad. 26 (P.C.).
3. (1907) I.L.R. 36 Cal. 193.
4. (1890) 19 Atlantic Rep. 898.
5. (1905) 2 C.L.J. 384 : 9 C.W.N. 956.
6. (1878) 98 U.S. 476.
7. (1838) 12 Peters U.S. 300.
8. (1838) 21 Peters U.S. 657, 718.
9. (1856) 5 Duer N.Y. 672.

provided by the section. From this it follows that the absence of an order of transfer is merely an irregularity in the assumption of jurisdiction by the Tenali Sub-Court when proceedings were commenced in it, but that objection not having been taken in the first instance, the judgment-debtor (the appellant) must be held to have waived it.

In this connection an observation in *Subramania Aiyar* v. *Swaminatha Chettiar*[1], affirmed by the Full Bench in *Ramier* v. *Muthukrishna Iyer*[2], is worthy of mention. It will be remembered that under Order 21, rule 5 if the Court to which the decree is to be sent is situate in the same District as the Court which passed the decree, the latter Court can send it directly to the former without the intervention of the District Court of the district in which the decree is to be executed. Adverting to this rule the learned Judges who decided *Subramania Iyer's case*[1], stated as follows :

" If both the Courts are situated in the same district, seeing that the transfer might be made directly from the first Court to the second Court, without the intervention of any superior Court, it may be said that the objection by reason of the language of section 38 or, in other words, by reason of the irregularity that the decree had not been formally sent to the second Court which has territorial jurisdiction is not fatal to the competency of the second Court to pass the order. In such a case, in spite of the irregularity, an order directing execution after notice may make the matter *res judicata*, but where as in this case, the transfer cannot be made directly to the second Court, and it should only be made first to the District Court of Tanjore and the District Court may either execute the decree itself or may send it to the Sub-Court (*vide* Order 21, rule 5), Civil Procedure Code, the irregularity cannot be overlooked as a mere irregularity."

The opinion of the learned Judges here expressed clearly supports the view that we have taken.

The result is that the order for sale passed by the Tenali Sub-Court in E. P. No. 57 of 1937 cannot be considered to be null and void and it therefore operates as *res judicata*. The appellant is accordingly precluded from raising the contentions which he has raised, however much they might be valid in themselves.

We accordingly hold that the appeal fails and must be dismissed with costs.

K.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNASWAMY AYYANGAR AND MR. JUSTICE KUNHI RAMAN.

Kailasam Pillai .. *Appellant** (*Defendant*)

v.

Sivabagyammal .. *Respondent* (*Plaintiff*).

Land—Superstructure—Ownership of land in one person—Moneys expended by another on superstructure—No definite agreement regarding rights of parties—Equity in favour of person expending on superstructure creating a charge on land for moneys expended.

Where the question was as to what were the respective rights of the parties in a case where the site was proved to belong to the respondent and the superstructure was put by the appellants' deceased father at his own expense but with the knowledge of the respondent and without the slightest protest on her part,

Held, that the determining factor was whether the owner of the land by her conduct or otherwise had created or encouraged in the person who put up the superstructure the hope or expectation of any interest in the property. The equity arising in favour of the person who had expended his own money would never fail merely on the ground that there was no definite understanding as to the nature of the right which he was to have in the property.

Therefore the appellant was, in the circumstances, entitled to a charge on the respondent's interest in the suit house, in respect of the moneys expended by his father over the superstructure.

Unity Bank v. *King*, (1858) 25 Beav. 72 : 53 E.R. 563; *Ramsden* v. *Dyson*, (1866) L.R. 1 H.L. 129 and *Plimner* v. *Mayor of Wellington*, (1884) L.R. 9 A.C. 699, applied.

Appeal against the decree of the Court of the Subordinate Judge of Salem, dated 11th December, 1940, in O. S. No. 18 of 1940.

T. R. Venkatarama Sastri and *T. V. Rajagopalan* for Appellant.

John and *Row* for Respondent.

The Judgment of the Court was delivered by

Krishnaswamy Ayyangar, J.—This appeal arises out of a suit instituted by the respondent for the recovery of possession of a house situated in the village of Athur

1. (1928) 28 L.W. 885.
2. (1932) 62 M.L.J. 687 : I.L.R. 55 Mad. 801 (F.B.).

*Appeal No. 106 of 1941. 17th November, 1942.

in the Salem District together with mesne profits. The appellant is the son of one Nathamuni Pillai who died on 26th April, 1935. The respondent is the widowed sister of Nathamuni. The house in dispute stands on a site purchased in parcels on four different occasions. The first purchase was under Ex. I, a sale deed, dated 22nd May, 1903, executed in favour of the respondent for Rs. 72-8-0. The second purchase was under Ex. I-A, dated 14th August, 1904, for Rs. 100 and this sale deed was taken not only in the name of the respondent but also of her deceased husband Velayudham. The third purchase was under Ex. I-A, dated 12th October, 1925. Here again the sale was in favour of the respondent alone, the consideration amount being Rs. 400. It is common ground that at the several dates when the purchases were made there were some thatched structures on the sites. A creditor of Velayudham brought up for sale in Court auction a half share in the site purchased under Ex. I-A on the footing that Velayudham was a part owner along with the respondent, and bought it himself. But this share was bought back in the name of the respondent under a sale deed Ex. I-E, dated 16th January. 1926, for Rs. 75. It is thus clear that the entire site on which the suit house stands was purchased in the name of the respondent and would *prima facie* belong to her unless it is satisfactorily made out that the purchases were effected *benami* in her name, the real purchaser being Nathamuni himself. The appellant's case is that Nathamuni was the real owner not only of the sites purchased in the name of the respondent, but that it was with his own monies that a costly building was put up on them. The Subordinate Judge who tried the suit came to the conclusion that the appellant's case that the respondent was merely a *benamidar* for Nathamuni had not been established; but he also found that it was Nathamuni who constructed the building with his own funds. He expressly negatived the contention of the respondent that she it was who found the money for the construction and that Nathamuni merely supervised. But all the same, he was of opinion, that the intention of Nathamuni in putting up the building was that it should be and remain the property of the respondent. In this view he decreed the suit in its entirety. The defendant has appealed and on his behalf the findings of the learned Subordinate Judge have all been contested, more particularly his conclusion that Nathamuni when he spent large sums of his own money in the construction of the house intended to make a gift of it to his sister, the respondent.

The appellant's learned advocate has entirely failed to convince us that the purchases of the several house sites were made with monies supplied by Nathamuni. It was not till 1906 or 1907 that Nathamuni started his toddy business and there is little evidence on the record to show that he was in possession of funds with which he could have made the first two purchases under Exs. I and I-A. On the contrary, it is much more likely that the respondent Sivabagyammal had scrapped together some monies out of her earnings as a school mistress and utilised them for the purchases. No satisfactory reasons have been adduced to show why Nathamuni considered it necessary or expedient to have recourse to a *benami* transaction at the time. There is much less reason for the inclusion of the respondent's husband's name as a purchaser in Ex. I-A. The burden of proving the *benami* nature of the transactions is heavily on the appellant and he has not discharged it and we must accordingly uphold the finding of the learned Judge on this point.

Nor are we satisfied that there is any substance in the respondent's contention that it was with her monies that the constructions were put up. The learned Judge was justified in declining to accept her fantastic evidence that she had secreted 80 or 85 sovereigns in the store room of the house besides a considerable amount of cash and jewels kept in a box, when she left on a pilgrimage to Benares, in 1925 or 1926. Her case is at complete variance with the picture as presented by herself in her letter Ex. II-A, dated 17th March, 1927. It shows beyond doubt that she had no monies of her own, and that she had to depend upon Nathamuni for her own maintenance and support. In this letter she asks, "Can you be so cruel to me because cloth and food are given to me? You may find fault with me by saying to the lay people that you have enquired of me as to what I needed, that you have helped me very much and that I have spoken like this." After this it is idle for her

to contend that her monies were utilised for the building, which was in fact started while she was on a pilgrimage tour. On the contrary, not only was Nathamuni doing a business as an abkari contractor at the time, but had sold his immovable property and it is therefore probable that he had sufficient money in his hands. We are of opinion that the learned Judge's findings on this point also cannot be disturbed.

But we are unable to accept the finding that it was Nathamuni's intention to make the respondent the owner of the building which he put up at considerable cost. There is, in fact, no material on which such a finding can legitimately be arrived at. The only circumstance on which the learned Judge relies is the knowledge of Nathamuni that the sites were not his but his sister's. But the sister was a childless widow with an ascetic turn of mind, who was bringing up his only son, the appellant. For a long time she had been without employment, and during that period she must have been supported by Nathamuni, though later the position appears to have been reversed. At the time when the constructions were made, Nathamuni had according to the respondent already sold away the major portion of his properties. She says that the sale was in 1922 whereas another witness, D.W. 6 has deposed that it was in 1927. In either view it is unlikely that he would have given away a considerable portion of his monies to his sister, leaving his only son to depend on the whim and fancy of a woman who on her own showing was inclined to attach more value to the founding of a mutt and the feeding of Sadhus therein than to the earthly needs of her brother and nephew. We think it more likely that Nathamuni thought that she would not assert her ownership of the site to the detriment of the appellant to whom she stood in the position of a foster mother. The subsequent conduct of the respondent, while it shows that she did not abandon her right to the sites, exhibits the consciousness that she was not entitled to the whole of the property, the site and the superstructure. Early in 1933, she objected to the transfer of registry in respect of the house by the Union Board to the name of Nathamuni. But later in the years after the registry was effected there are a number of letters written by her in which she besought her brother to recognise her right to a half share only in the house and to no more. Reference was also made by her advocate to certain mortgages executed by the respondent over the property in dispute. But it is satisfactorily established that the money was really taken by Nathamuni and applied for the construction of a well in the premises. There is also the fact that after the completion of the house, it was Nathamuni who lived in it, and let a portion out to a tenant and enjoyed the rental income. The only conclusion possible in all the circumstances is that the buildings were erected by Nathamuni in the belief that the respondent would not assert her right to the site, against himself and his son, the appellant, but that he never intended to make a gift of the superstructure to her to the detriment of his only son. In fact, she did not assert her right till 1933 by which time the building had been long completed.

The question then arises as to what are the respective rights of the parties in a case where as here, the site belongs to one, and the superstructure is put by the other. We should add that in this case the superstructure was raised with the knowledge of the respondent and without the slightest protest on her part. In fact, she made suggestions as to how the construction should be made, by giving the advice that the roof should be terraced and not tiled. Her conduct while the building was in progress raises the inference that she did in fact encourage Nathamuni to lay out his own money on the construction. On these facts which are very similar to those which existed in the *Unity Bank* v. *King*[1], an equity arises in favour of Nathamuni who expended his money on his sister's land. In the case quoted, a father had allowed his sons the use or occupation of his premises without any arrangement as to the terms on which they should hold the property. The whole transaction was one of mutual confidence, and subject to future arrangement, but the father never made over or relinquished the property in the premises, but on the contrary, intended to reserve it for himself. The sons erected, and the

---

1. (1858) 25 Beav. 72 : 53 E.R. 563.

father allowed them to erect, buildings at great expense. The question arose as to what were the respective rights of the parties in a suit instituted by a mortgagee of the premises from the sons. The Master of the Rolls, Sir John Romilly, after stating the facts observed as follows :

"I am of opinion that he (the father) could not have taken posssession of that land again, without allowing to his sons the amount of the money they had laid out upon it. Without therefore coming to the conclusion, which, upon the evidence, I have not come to, that he had intended to make or that he had made over to his sons his interest in the property, I am of opinion that the money laid out by the sons was a lien and charge upon it, as against the father."

The leading case on the subject is *Ramsden* v. *Dyson*[1], in which the principle is stated in the classic judgment of Lord Kingsdown in the following passage:

" If a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation created or encouraged by the landlord that he shall have a certain interest, takes possession of such land with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord and without objection by him, lays out money upon the land, a Court of Equity will compel the landlord to give effect to such promise or expectation. This was the principle of the decision in *Gregory* v. *Mighell*[2] and, as I conceive, is open to no doubt. If at the hearing of the cause there appears to be such uncertainty as to the particular terms of the contract as might prevent a Court of Equity from giving relief if the contract had been in writing but there had been no expenditure, a Court of Equity will nevertheless, in the case which is about stated, interfere in order to prevent fraud, though there has been a difference of opinion amongst great Judges as to the nature of the relief to be granted. Lord Thurlow seems to have thought that the Court would ascertain the terms by reference to the Master, and if they could not be ascertained would itself fix reasonable terms. Lord Alvanley, and Lord Redesdale, and perhaps Lord Eldon, thought this was going too far ; but I do not understand any doubt to have been entertained by any of them that, either in the form of a specific interest in the land, or in the shape of compensation for the expenditure, a Court of Equity would give relief, and protect in the meantime the possession of the tenant. If, on the other hand, a tenant being in possession of land, and knowing the nature and extent of his interest, lays out money upon it in the hope or expectation of an extended term or an allowance for expenditure, then, if such hope or expectation has not been created or encouraged by the landlord, the tenant has no claim which any Court of Law or Equity can enforce. This was the principle of the decision in *Philling* v. *Armitage*[3] and, like the decision in *Gregory* v. *Mighell*[2], seems founded on plain rules of reason and justice."

The determining factor is whether the owner of the land by his conduct or otherwise created or encouraged the hope or expectation referred to in this passage. The equity which arises in favour of the person who has expended his own money will not fail merely on the ground that there was no definite understanding as to the nature of the right which he is to have in the property. This was expressly stated by Sir Arthur Hobhouse in delivering the judgment of the Privy Council in *Plimner* v. *Mayor of Wellington*[4]. The equity will of course vary according to the particular circumstances proved. This is clearly indicated in the following passage in the judgment where their Lordships approved of the decision in the *Unity Bank* v. *King*[5] already referred to :

" Referring again to the passage quoted from Lord Kingsdown's judgment, there is good authority for saying what appears to their Lordships to be quite sound in principle, that the equity arising from expenditure on land need not fail merely on the ground that the interest to be secured has not been expressly indicated.

In such a case as *Ramsden* v. *Dyson*[1], the evidence (according to Lord Kingsdown's view) shewed that the tenant expected a particular kind of lease, which Vice-Chancellor Stuart decreed to him, though it does not appear what form of relief Lord Kingsdown himself would have given. In such a case as the *Duke of Beaufort* v. *Patrick*[6], nothing but perpetual retention of the land would satisfy the equity raised in favour of those who spent their money on it, and it was secured to them at a valuation. In such a case as *Dillwyn* v. *Llewelyn*[7], nothing but a grant of the fee simple would satisfy the equity which the Lord Chancellor held to have been raised by the son's expenditure on his father's land. In such a case as that of the *Unity Bank* v. *King*[5], the Master of the Rolls, holding that the father did not intend to part with his land to his sons who built upon it, considered that their equity, would be satisfied by recouping their expenditure to them. In fact, the Court must look at the circumstances in each case to decide in what way the equity can be satisfied."

We are clearly of opinion that the present case falls within the principle of these decisions. We must accordingly hold that the appellant is entitled to a charge on the property in respect of the monies expended by Nathamuni. The Subordinate

1. (1865) L.R. 1 H.L. 129.
2. (1811) 18 Ves. 328 : 34 E.R. 341.
3. (1805) 12 Ves. 78 : 33 E.R. 31.
4. (1884) 9 A.C. 699.
5. (1858) 25 Beav. 72 : 53 E.R. 563.
6. (1853) 17 Beav. 60 : 51 E.R. 954.
7. (1862) 4 D.F. and J. 517 : 45 E.R. 1285.

Judge has found, and it has not been disputed before us, that the value of the construction is Rs. 4,000. He has also held that the appellant is entitled in any event to no more than this amount, if his claim should be upheld. In the view we have taken we hold that the decree of the Court should be modified by deleting clauses 2 to 5 of the decree of the lower Court and adding at the end of clause 1 the following words, namely, "on her paying to him the sum of Rs. 4,000 representing the value of the improvements effected by Nathamuni."

We direct that each party should bear his own costs both here and in the Court below in view of the fact that both sides have been guilty of putting forward false cases and adducing false evidence. The direction on the lower Court's decree that the respondent should pay the court-fee due to Government shall stand.

(This appeal coming on for being mentioned, the Court made the following)

ORDER.—Instead of the words "and this sum shall be a first charge on the suit house" in clause 6 of the decree of the lower Court the following words shall be substituted "and this sum shall be a first charge on the plaintiff's interest in the suit house as decreed to her."

K.C. *Decree modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Venkataswami Naicker and others .. *Appellants** (*Defendants*)

v.

P. V. Navaneethakrishna Chettiar ... *Respondent* (*Plaintiff*).

Limitation Act (IX of 1908), article 137—Sale of property—Lease on land—Lease to continue for two more years—Obstruction to delivery by tenant—Limitation runs only from the date when the lease expired—Suit for possession.

In 1921, one *T* leased the suit property to *S*. The plaintiff's predecessor-in-title brought the property to sale and purchased it in 1925. The auction purchaser applied for delivery in the same year. But the tenant in actual possession obstructed delivery of possession to the purchaser on the ground that the lease in his favour would continue for two more years. Symbolical delivery being declined, the application was dismissed and the plaintiff's predecessor-in-title took no further steps. In 1932 the plaintiff bought the property. Even he took no steps for some years. On the question of limitation for a suit for possession,

Held, that the article that governed this case was article 137 of the Limitation Act ; and that time would begin to run only from the date on which the plaintiff's predecessor-in-title was entitled to physical possession of the land. Since the present suit was brought within 12 years from that date when *T* was entitled to possession himself according to the terms of the lease on which he let out, the plaintiff's suit was in time.

Appeal against the decree of the Court of the Additional District Judge of Coimbatore in A. S. No. 136 of 1940, preferred against the decree of the Court of the District Munsiff of Udumalpet in O. S. No. 285 of 1938.

T. S. Vaidyanatha Aiyar for Appellants.

V. C. Veeraraghavachari for Respondent.

The Court delivered the following

JUDGMENT.—On 22nd August, 1921, one Thirumalaiswami Naicken leased the suit property to one Subba Naicken. The plaintiff's predecessor-in-title in execution of a decree against Thirumalaiswami, brought the property to sale and purchased it on 29th June, 1925. The sale was confirmed on 30th July, 1925. On 22nd October, 1925, the auction-purchaser applied for delivery ; but the tenant naturally obstructed the delivery and upon notice being given to him he said that he was in possession under the lease Ex. D of 22nd August, 1921, that the lease had still two years or so to run, and that until the term of the lease expired he was entitled to remain in possession. The Court then ordered symbolical delivery ; but the auction-purchaser endorsed on the petition that she did not press her application as she was content to wait until the lease expired. So the application was dismissed on 18th March, 1926. The plaintiff's predecessor-in-title took no steps to reduce the land to possession. On 7th July, 1932, she sold it to the plaintiff. Even the plaintiff took no steps for many years. He then set up a lease to one Palani Goundan, which

*S. A. No. 235 of 1941. 30th October, 1942.

was found by the lower Courts to be a bogus and collusive transaction entered into in order to avoid any difficulties that might arise because the plaintiff and his predecessor-in-title had taken no steps to reduce the property to possession. The trial Court held that time began to run from the date of confirmation of sale, 30th July, 1925; but the lower appellate Court held that the time did not begin to run until the lease expired. It therefore decreed the plaintiff's suit for possession. It may be mentioned that the plaintiff had obtained an *ex parte* decree against Palani Goundan and attempted to obtain possession in execution of that decree. He was, however, obstructed by the present defendants, who belong to the family of Thirumalaiswami. The plaintiffs were unsuccessful in the resulting claim petition and so brought the present suit.

On the above evidence and also upon the finding that the defendants had no title to the land and were mere trespassers, the question is whether time began to run against the plaintiff's predecessor-in-title from 30th July, 1925 or from the date of the expiry of the lease. The difficulty in deciding this point arose from the fact that the auction-purchaser declined the offer of the Court to put her in symbolical possession. So it is rather difficult for the plaintiff to argue that despite the fact that symbolical delivery was refused, he was nevertheless in constructive possession of the land during the remainder of the lease. If therefore the plaintiff had to prove that he was in possession within 12 years of the suit he would have failed. But the learned advocate for the plaintiff argues that the article of the Limitation Act which applies is article 137; and I agree with him. It seems to me that article 137 was framed precisely to deal with cases like the present one, where a person was not in possession at the date of sale. It can be said perhaps that Thirumalaiswami Naicker was in constructive possession; but it seems clear to me from a perusal of articles 136, 137 and 138, and other articles that the possession referred to is actual possession, and not constructive or symbolical possession. Thirumalaiswami had no right to the possession of the land until 22nd August, 1927, and clearly the plaintiff's predecessor-in-title could not have brought a suit before that date; for she was not entitled to physical possession. One would expect therefore that time would begin to run only from the date on which she was entitled to physical possession of the land; and that is what article 137 says. As this suit was brought within 12 years from the date when Thirumalaiswami was entitled to possession according to the terms of the lease, the plaintiff's suit was in time.

The appeal is dismissed with costs.

K.C. — *Appeal dismissed.*

[PRIVY COUNCIL.]

PRESENT:—LORD THANKERTON, LORD MACMILLAN, LORD ROMER, SIR GEORGE RANKIN AND SIR MADHAVAN NAIR.

Raghbir Lala and others .. *Appellants**

v.

Mohammad Said and others .. *Respondents.*

Hindu Law—Religious endowment—Jain monastic order—Member living life of house-holder—Acquisition and enjoyment of property—Succession—Right of institution—Recital in sale deed—Meaning of word "gaddi."

If a question arises whether a particular property acquired by a given individual was acquired on his own behalf or on behalf of some other person or institution with whom or with which he was connected, the circumstance that the individual so acquiring property was a professed ascetic may have importance. But it is out of question to suppose that a man's religious opinions or professions can make him incapable in law of holding property.

A Jain who ostensibly belonged to a monastic order was shown to have lived like a *grihastha* or householder, and acquired and managed property. After his lifetime certain members of the order sued to establish their rights to a certain property acquired by him. The evidence was not clear as to the source of the purchase money and the sale deed in favour of the deceased recited that it had been purchased "with the money of his own *gaddi*." There was no evidence of any dedication of the property purchased in favour of the Jain institution.

Held, that under the circumstances the proper inference was that the property was the private property of the deceased and that the plaintiffs were not entitled to recover the same on behalf of their institution.

Meaning of the word "*gaddi*" discussed.

---

*P. C. A. No. 42 of 1938. 20th July, 1942

On appeal from the High Court of Judicature at Lahore.

Sir A. E. Wort and *S. Row* for Appellants.

C. S. Rewcastle, K.C. and *S. Hyam* for Respondents.

Their Lordships' Judgment was delivered by

SIR GEORGE RANKIN.—The appellants represent the plaintiffs in a suit brought on the 19th April, 1921, in the Court of the Subordinate Judge at Delhi to eject a large number of defendants from certain lands known as the Minarwala garden at or near Subzi Mandi at Delhi. The defendants were persons who claimed title directly or indirectly to divers portions of the land under transfers made in 1915 and 1916 by one Janindar Kirat. The plaintiffs' case at the trial and before the Board is that the land in suit is *debutter*, being property dedicated to religious uses of the Digambar sect of Jains. It is described in the plaint as *dharamarth* and as *waqf*. The plaintiffs sued as followers of the said sect and as having been appointed to recover the property by a general meeting of persons interested in a Jain temple or temples at Delhi. On the 28th November, 1921, an order under rule 8 of Order 1 of the Code appointed them to represent the Jain community at Delhi for the purposes of the suit. The trial Court by decree dated 29th February, 1928, decided in the plaintiff's favour, but the High Court, on 7th March, 1935, reversed this decision and dismissed the suit.

The Minarwala property was the subject of a deed of sale dated 4th December, 1895. It was described as a garden with certain buildings thereon which were partly intact and as measuring 6 bighas and 13 biswas. It was said to have two wells and to carry with it the right to draw water in a certain manner from the Jamna canal. The vendor was one Jauhri Mal and the purchase price Rs. 7,000. A pandit called Jia Lal acted for the purchaser. He belongs to the town of Farrukh Nagar, which is not far from Delhi, and he gave evidence at the trial for the plaintiffs. The purchaser was magniloquently described in the deed as Digambar Acharya Maharaj Bhattarak Sri Manindar Kirat Ji, *guru* of the *Saraojis* and *gaddi nashin* of Kashta Sang, Delhi city. According to the translation laid before their Lordships, the deed contained the following sentence :

> " The said vendee has purchased and acquired with his own fund of his gaddi the aforesaid garden together with all the appurtenant rights for constructing a Jain temple and dharmasala and for a small garden."

The learned Subordinate Judge having transcribed what he takes to be the words of the vernacular, translates the important words by the phrase " with the pure money of the capital of his " gaddi ". The learned Judges of the High Court say that the recital is that it was " the money of his gaddi," but do not profess to be clear as to the meaning. Learned counsel for the plaintiffs in the High Court appears from the judgment to have read it as meaning " from the special fund of his own gaddi."

As to the purchase money, it is not now contended that its source has been proved or that its *debutter* character can be established by tracing its origin. Jia Lal's evidence and the Sub-Registrar's endorsement on the sale deed show that Rs. 1,000 had been borrowed from Rai Bahadur Sultan Singh, who was the original plaintiff No. 1 ; that it was paid to the vendor as earnest money ; and that the lender has been repaid. The same evidence proves that on the day after the deed was executed Jai Lal handed to the vendor before the Sub-Registrar a promissory note for Rs. 2,500 and Rs. 3,500 in notes and coin. Jai Lal says that the promissory note had been received from Arrah and Chapia, but that he does not know who the drawer and drawee were. Also that the currency notes and cash were obtained from the cashier or Manindar. Beyond this nothing is known of the source of the purchase money.

No case is made by the plaint as to the original source of the money, but in para. 2 it is suggested that the land was bought out of the fund of a Delhi gaddi which belonged to the Agarwal Jains of the Digambar sect and of which Manindar was the gaddinashin. The plaintiffs have not, however, succeeded in showing that any Jain temple or institution in Delhi or elsewhere had any claim to the

money with which Manindar purchased the land in suit. When he came to Delhi (which was some time before 1895) there existed in Delhi a Jain temple in the Khajur Mohalla which was managed by a panchayat and is called a Panchayati temple. At first he was welcomed by the followers or *shravaks*, but before 1895 they had ceased to countenance him. It is not proved that he was ever given a position of authority in this temple, whether as Bhattarak or otherwise; and if he was a Bhattarak it would appear that monetary or other business transactions on its behalf would not have fallen within his sphere, which would have been confined to that of a religious teacher and ascetic.

Again, it is not shown that Manindar, having acquired the land in suit, dedicated it to any Jain institution or religious purpose. Whether because he had quarrelled with those who frequented the existing Jain temple or because he had ambitions of his own he had a project of building a new temple. What his own position in regard to it was to be after it had been constructed does not appear, because his project was not carried out. The subscriptions which he solicited were insufficient to build more than the foundations, and there was trouble about the proximity of a mosque. The land now in suit does not include the actual site of these foundations, as the High Court is careful to notice. The remainder of the land was used by Manindar for his own purposes—on one part he lived in some sort of hutment; on another he set up a small *chattiala*, apparently a room containing a wooden bench on which one or two images were placed; other parts were let out and the rents used for his maintenance. He appears to have made money by practising astrology and medicine and by lending money—occupations which he added to that of a religious teacher. There is no reliable evidence to show that the *chattiala* was a public temple. His life and conduct may not have been in accord with his religious professions as a Jain ascetic, but in fact he held and managed the property which he had bought, and indeed litigated about it, as if it were his own without any interference or assistance by the Jain community. The plaintiffs cannot claim to succeed on the ground of dedication by Manindar.

The learned Subordinate Judge proceeded not so much upon evidence of Jain witnesses as upon information derived by him from articles on Jainism in certain Encyclopaedias and other books. He notices that,

> " the ordinary idea of a *gaddi* involves the existence of an institution managed by some person who becomes the head of the institution and sits on the *gaddi* or seat of authority of the institution as its head. The very idea of an institution involves the existence of some property or business, religious, public or private, which the *gaddi nashin* manages. When Manindar Kirat first came to Delhi there was no other *gaddi* except the *Panchayati* temple in the Masjid Khajurwali lane."

He found that Kashta Sangh was not a Jain *gaddi* in the ordinary sense; that a Jain sadhu or Digambar-acharya would not manage any institution; that

> " these Sanghs are merely monastic orders of Jain sadhus or acharyas."

He enlarged on the precepts by which the Jain religion prescribes asceticism for its devotees and held that by the tenets of that religion an acharya is incompetent to acquire, hold or manage property. His conclusion is that

> " the suit property was not the personal property of Manindar Kirat. It was the property of his *gaddi* known as Kashta Sangh Gaddi, though not appertaining to any special Jain shrine." " This finding," he adds, "is somewhat based on the inferential reasoning as to the status of Jain acharyas and the practices which they are enjoined to follow."

The High Court observe that it is based

> " on a theoretic consideration of certain books appertaining to Jain doctrines on the question of the nature of a Bhattarak."

The only authoritative definition which has been produced of this word Bhattarak is that it means

> " a head of the Digambar sect of the Jains who clothes himself in one garment which he lays aside during meals."

This may be taken to imply asceticism, but does not show that the Bhattarak has a relation to any institution like that which a *mahant* has to a *math*. Their Lordships are in agreement with the High Court in thinking that the learned Subordinate Judge's reasoning cannot be accepted. No doubt if a question arises whether particular property acquired by a given individual was acquired on his own behalf

or on behalf of some other person or institution with whom or with which he was connected the circumstance that the individual so acquiring property was a professed ascetic may have importance. But it is out of the question to suppose that a man's religious opinions or professions can make him incapable in law of holding property. He may fail to act up to them or take heretical and inconsistent views without incurring any penalty or disability at law. In the present case it is plain enough on the one hand that Manindar acted not so much like an ascetic as like a *grihasta* or house-holder. He did buy and manage property. He acquired and even dealt in money. He practised medicine and astrology for payment. He lived with a woman by whom apparently he had a son. In such circumstances professions of complete asceticism as a religious doctrine or a philosophical position would seem to go but a little way to show that he was not acting for himself in his various transactions. On the other hand, it is reasonably clear that he was not acting for the Panchayati temple in Khajur Mohalla, and the learned trial Judge has himself shown that the Kashta Sangh, though called a *gaddi*, is really a "monastic order" and not an institution owning property.

In the absence of any real information as to the source of the purchase money these circumstances afford but a poor foundation for the plaintiffs' case. Can they be regarded as sufficient when reinforced by the recital in the sale deed of 4th December, 1895? What is meant by "the money of his own gaddi?" Does this refer to any religious institution as the owner of the money or to the money as part of any religious endowment? The learned Judges in the High Court were puzzled by the phrase, but considered that it may have been used to convey that the money was his private money and had nothing to do with the Jain community. Their Lordships cannot claim to be confident upon the point, but consider this to be a probable interpretation. The word *gaddi* is used very loosely and in different senses; in one use of the word a *gaddi* appears to be a necessary part of the dignity of a religious ascetic in the highest class. The words here are "*of his own gaddi*" and the phrase is wholly insufficient to raise against him any kind of trust or to show that the money was not his own.

Manindar, having died in 1914, was succeeded by Janindar Kirat, who made the alienations of which the plaintiffs complain. It is not now contended that if the property in suit was not *debutter* in Manindar's hands it became so by reason of Janindar Kirat's succession. Since he claimed to succeed not only as *Chela*, but also by reason of a will and an adoption, the fact of his succession throws no light upon any disputed issue in this case.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellants will pay the costs of those of the respondents who appeared.

Solicitors for Appellants: *T. L. Wilson & Co.*

Solicitors for Respondents: *Barrow Rogers & Nevill.*

B.V.V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Annam Venkatakutumba Rao .. *Petitioner** (*Petitioner*)

v.

Yenduri Veerabhadrudu (died) and others .. *Respondents* (*Respondents*).

Madras Agriculturists' Relief Act (IV of 1938), sections 19 and 3 (ii), Proviso A—Division of joint Hindu family on 30th March, 1936—Assessment of manager to income-tax for 1936-37 in ignorance of division—Divided member not disentitled to benefits of Act.

Though a debtor had become divided from his uncle as a result of a partition suit decreed on 30th March, 1936, the uncle was assessed to income-tax in ignorance of such division as manager of a joint Hindu family for 1936-37.

Held, that under Madras Act IV of 1938, the family so assessed cannot be deemed to be a person after 30th March, 1936, and the divided member (who had not in fact been assessed to income-tax

*C. R. P. No. 1405 of 1942 (A. A. O. No. 110 of 1940, converted into C. R. P.). 6th October, 1942.

and whose income could not, having regard to the provisions of section 14 of the Income-tax Act be deemed to have been assessed by the assessment) is not disentitled to the benefits of Madras Act IV of 1938.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge of Bezwada, dated 20th October, 1939 and made in C. M. P. No. 1048 of 1938 in O. S. No. 9 of 1935.

Ch. Raghava Rao for Petitioner.

B. V. Ramanarasu and *N. Vasudeva Rao* for Respondents.

The Court delivered the following

JUDGMENT.—The petitioner was second defendant in a suit which was decreed against him and his uncle first defendant. He has been refused relief under section 19 of Act IV of 1938 on the ground that he was not an agriculturist having been assessed to income-tax. In fact he became divided from his uncle as a result of a partition suit decreed on 30th March, 1936. In ignorance of this division the Income-tax Officer assessed the first defendant to income-tax as manager of a joint family for 1936-37. This assessment is valid with reference to section 25-A (3) of the Income-tax Act and having regard to section 14 (1) of that Act the assessment cannot be regarded as the assessment of the second defendant's share of the income.

Under Act IV of 1938, the family which has been assessed to income-tax notwithstanding its disruption, cannot be deemed to be a person after 30th March, 1936. The petitioner is himself a person who has not in fact been assessed to income-tax and whose income could not be deemed to have been assessed by this assessment having regard to the provisions of section 14 (1) of the Income-tax Act. We are therefore constrained to hold that the petitioner is not disentitled to the benefits of Act IV of 1938. We allow the revision petition with costs and direct that the decree be amended so as to make the petitioner liable for Rs. 2,500 with interest at 6 per cent. from 1st October, 1937, and costs Rs. 619-3-0 with interest thereon at 5 per cent. from 3rd April, 1935 to 22nd March, 1938 and thereafter at 6 per cent.

K.S. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

Fatima Bibi and another .. *Appellants** (*Plaintiffs 2 and 3*)

v.

A. Hajee Muhammad Usman Sahib (died). *Respondent* (*Deft. 2 and L.R. of Deft. 1*).

Civil Procedure Code (V of 1908), Order 21, rule 63—Attachment of property by decree-holder—Obstruction on ground of adverse possession—Declaratory suit permissible—Limitation—Suit arresting running of time.

On the question whether a suit filed in time by a decree-holder under Order 21, rule 63, Civil Procedure Code, to declare his right to attach certain properties could arrest the running of limitation in favour of a person in adverse possession of the property,

Held, that the institution of a suit under Order 21, rule 63 arrested the running of time in favour of the person in adverse possession.

Dharapuram Janopakara Nidhi, Ltd. v. *Lakshminarayana*, (1939) 1 M.L.J. 802 : I.L.R. (1939) Mad. 803 (F.B.), explained and distinguished.

Appeal against the decree of the Court of the Subordinate Judge of Chingleput, dated 27th July, 1940, in O. S. No. 21 of 1940.

V. Ramaswami Aiyar and *M. Natesan* for Appellants.

Ch. Raghava Rao and *Md. Saluluddin* for Respondent.

The Order of the Court was delivered by

The Chief Justice.—The main question in this appeal is whether a suit filed by a decree-holder under the provisions of Order 21, rule 63, Civil Procedure Code, to declare his right to attach certain property arrests the running of limitation in favour of a person in adverse possession of the property.

*Appeal No. 399 of 1940. 3rd December, 1942.

The parties are Mohammadans and are relations. The suit out of which this appeal arises was filed in the Court of the Subordinate Judge of Chingleput by A. Abdul Gaffoor, who died during its pendency. Thereupon his widow, Fatima Bibi, and his daughter, Bathla Bibi, continued the suit as his legal representatives. The first defendant is the brother of the deceased plaintiff and the second defendant is his sister. The second defendant is the widow of one Dastagiri Sahib, who died in the month of February, 1920. Dastagiri was also survived by a son Mohamed Ghouse, and a daughter, Mahaboobi. On the 27th November, 1933, A. Abdul Gafoor obtained a decree against the estate of Dastagiri for the payment of Rs. 8,215-10-8. In execution of that decree he attached the properties with which this suit is concerned. The attachment was objected to by the first defendant on the ground that the properties had been conveyed to him by the second defendant on behalf of herself and her children by two conveyances, one dated the 24th July, 1923 and the other dated the 24th June, 1924. The first defendant's objection to the attachment was upheld and as the result, this suit was filed on the 24th July, 1935. The plaintiffs averred that the conveyances to the first defendant were sham transactions and therefore of no legal effect. The Subordinate Judge held that they were supported by consideration and were entered into *bona fide*.

The consideration of the conveyance of the 24th July, 1923, was stated to be Rs. 10,000 of which Rs. 1,250 was paid to the widow in cash and the balance paid in discharge of debts due by Dastagiri's estate on a mortgage and a promissory note. The consideration for the conveyance of the 24th June, 1924, was Rs. 7,000, of which Rs. 1,000 was paid in cash to the widow and Rs. 6,000 in discharge of a mortgage debt owing by the estate. The Subordinate Judge was also of the opinion that the first defendant had obtained a title to the properties by adverse possession. Consequently he dismissed the suit.

We agree with the Subordinate Judge that the conveyances of the properties in suit to the first defendant were *bona fide* and that the consideration passed; but this does not mean that the first defendant obtained a complete title to the property. He undoubtedly did obtain a title to the one-eighth share of the second defendant, but he obtained no title to seven-eighths of it, which represented the interests of the son and the daughter. The second defendant was not the lawful guardian of the son and daughter and had no power to sell their interests in the estate. Therefore, so far as the interests of the son and daughter were concerned, the conveyances were entirely inoperative, and the seven-eighths of the property remained the property of the son and daughter and liable for attachment in execution of the decree passed against them.

This means that if the first defendant has not been in possession of the property adverse to the son and daughter for a period of twelve years before suit, the plaintiffs are entitled to a declaration that they have a right to attach seven-eighths of it in execution of their decree. The suit was filed within twelve years of the 24th July, 1923, the date of the first conveyance.

It has been decided in this Province that an order of attachment does not interrupt the possession of a person holding adversely to the true owner. This was held in 1901 in *Seetharama Reddi* v. *Venku Reddi*[1] and in 1925 in *Ranganatha Iyer* v. *Srinivasa Iyengar*[2]. In *Vasudeo Atmaram Joshi* v. *Eknath Balkrishna Thite*[3], the Bombay High Court expressed an opinion to the contrary. This conflict was considered by a Full Bench of this Court in *Dharapuram Janopakara Nidhi, Ltd.* v. *Lakshminarayana*[4], and the Full Bench upheld the opinion expressed in the two earlier decisions of this Court. While an order for attachment does not interfere with adverse possession, the filing of a suit for a declaration of the right to attach property against the person in possession is another matter.

On behalf of the defendants-respondents it has been suggested, that in the judgment of the Full Bench in *Dharapuram Janopakara Nidhi, Ltd.* v. *Lakshminarayana*[4]

1. (1901) 11 M.L.J. 344.
2. (1925) 49 M.L.J. 656.
3. (1910) I.L.R. 35 Bom. 79.
4. (1939) 1 M.L.J. 802 : I.L.R. (1939) Mad. 803 (F.B.).

it was held that the filing of a suit does not interrupt possession. This argument is based on the following extract from the judgment, which was delivered by Varadachariar, J.:—

> "The suit is often but a step to enable the decree-holder to bring the property to sale; if by reason of the extinction of the judgment-debtor's title before the sale, there would be nothing to be sold, a declaration in the decree-holder's favour in the suit under Order 21, rule 63, will not only be futile, but sometimes even be mischievous, as it may mislead an unwary purchaser into thinking that he was buying a subsisting interest."

These observations have to be read in connection with what goes before and what comes afterwards. Immediately before are these observations :—

> "But the suit under Order 21, rule 63 is in form and in substance a declaratory suit and it seems to me that it will be an unreasonable exercise of discretion by the Court to make a declaration, in such a case, of the decree-holder's right to attach if the period of limitation of 12 years had expired between the date of the attachment and the date of the institution of the suit unless the property had already been sold in time."

Immediately after the passage relied upon by the defendants-respondents, Varadachariar, J., said that "in this view" he was inclined to agree with *Seetharama Reddi* v. *Venku Reddi*[1] and *Ranganatha Iyer* v. *Srinivasa Iyengar*[2] in preference to *Vasudeo Atmaram Joshi* v. *Eknath Balkrishna Thite*[3] and *Pandiyan Pillai* v. *Vellayyappa Rowther*[4], where the Bombay opinion had been accepted. The question which was before the Full Bench was whether an order for attachment interfered with possession. The Court was not considering the question now under discussion, but the concluding portions of the judgment in the Full Bench case when read together indicate that if a suit is filed before the 12 years period of limitation has expired the Court is entitled to declare the rights of the parties at the date of the suit.

In *Seetharama Reddi* v. *Venku Reddi*[1], a prescriptive right had been acquired before the institution of the suit, which was also the case in *Ranganatha Iyer* v. *Srinivasa Iyengar*[2]. A decree-holder whose attachment has been raised is given by the statute the right to institute a suit for a declaration of his right to attach, and the declaration must have regard to the rights of the parties at the date of the institution of the suit. It would be a negation of the right given by Order 21, rule 63, to hold that, when the suit has been filed in time, the person wrongly in possession of the property can get a title by adverse possession after the institution of the suit. In our opinion, the institution of the suit arrests the running of time in favour of the first defendant. This means that the plaintiffs-appellants are entitled to a declaration of their right to attach seven-eighths of the property in suit.

This does not, however, dispose of the suit because the first defendant's case is that he discharged the debts owed by the estate and therefore is in equity entitled to a charge on the properties in his possession for the total amount paid by him. An issue was framed on this question, but in view of the dismissal of the suit by the Subordinate Judge on the grounds indicated, it was not necessary to decide this question. It is now necessary to decide it and we call for a finding on the last part of the second issue, which relates to this question. The Subordinate Judge's finding, which will be based on the evidence on the record, will be submitted to this Court within one month of the receipt by him of this order. Seven days will be allowed for the filing of objections.

K.C. *Finding called for.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(In Insolvency).

Present :—Mr. Justice Krishnaswamy Ayyangar.

In re T. A. Balakrishna Odayar (Deceased) .. *Insolvent.**

Presidency Towns Insolvency Act (III of 1909), section 68—Powers of Official Assignee—Settlement of claim—Compromise entered into—Leave of Court not applied for or obtained—Effect—Application by succeeding Official Assignee for directions—Procedure.

---

1. (1901) 11 M.L.J. 344.
2. (1925) 49 M.L.J. 656.
3. (1910) I.L.R. 35 Bom. 79.
4. (1917) 33 M.L.J. 316.

*I. P. No. 552 of 1927. 29th August, 1941.

The powers and duties of the Official Assignee fall into two categories. Those in sub-section (*i*) clauses (*a*) and (*b*) of section 68 of the Presidency Towns Insolvency Act can be exercised without the Official Assignee seeking the leave of the Court. But in regard to the others described in clauses (*c*) to (*i*) the section says that he may do all or any of them by leave of the Court. But even in the later class of cases the omission of the Official Assignee to seek and obtain the leave of the Court will not affect the validity of his acts. Where the Official Assignee entered into a compromise by which he settled a claim, but leave of the Court was not obtained therefor, and his successor-in-office applied to the Court for directions as to whether the settlement could be given effect to,

Held, that the absence of the leave of the Court did not affect the validity of the settlement arrived at, and that the compromise should be given effect to.

Lee v. *Sangster*, (1857) 2 C.B. (N.S.) 1 : 140 E.R. 310; *Leaming* v. *Lady Murray*, (1879) 13 Ch.D. 123; *Laduram Nathumall* v. *Nandalal Karuri*, (1919) I.L.R. 47 Cal. 555 and *The Official Receiver, Coimbatore District* v. *Kanga*, (1921) 42 M.L.J. 53, considered.

Official Assignee (*V. Thyagarajan*) in person.

R. Gopalaswami Ayyangar for Insolvent.

The Court delivered the following

JUDGMENT.—This is an application taken out by the Official Assignee with respect to a settlement made by his predecessor-in-office of a claim to preferential payment made by the respondent. By that settlement the then Official Assignee had agreed to pay to the respondent a sum of Rs. 12,000 against a claim of Rs. 24,000 or thereabouts. In pursuance of the settlement, he paid a sum of Rs. 6,000 and there still remains a balance of Rs. 6,000 to be paid on foot of the settlement. The Official Assignee who entered into this settlement did so without applying for and obtaining leave of the Court under section 68 of the Presidency Towns Insolvency Act (III of 1909). The present Official Assignee has very properly placed the matter before the Court with the request that the Court may either give its approval to the settlement or give such other directions as the Court may consider it proper. The question thus raised by the present application is one of considerable importance likely to recur frequently and it is desirable that I should take this opportunity to lay down the correct rule for guidance in future.

Section 68 of the Presidency Towns Insolvency Act enacts as follows :—

" (1) Subject to the provisions of this Act, the Official Assignee shall, with all convenient speed, realise the property of the insolvent, and for that purpose may—

(*a*) sell all or any part of the property of the insolvent ;

(*b*) give receipts for any money received by him ; and may, by leave of the Court, do all or any of the following things, namely :

(*c*) carry on the business of the insolvent so far as may be necessary for the beneficial winding up of the same ;

(*d*) institute, defend or continue any suit or other legal proceeding relating to the property of the insolvent ;

(*e*) employ a legal practitioner or other agent to take any proceedings or do any business which may be sanctioned by the Court ;

(*f*) accept as the consideration for the sale of any property of the insolvent a sum of money payable at a future time or fully paid shares, debentures or debenture stock in any limited company subject to such stipulations as to security and otherwise as the Court thinks fit ;

(*g*) mortgage or pledge any part of the property of the insolvent for the purpose of raising money for the payment of his debts or for the purpose of carrying on the business ;

(*h*) refer any dispute to arbitration, and compromise all debts, claims and liabilities, on such terms as may be agreed upon ;

(*i*) divide in its existing form amongst the creditors according to its estimated value, any property which, from its peculiar nature or other special circumstances, cannot readily or advantageously be sold.

(2) The Official Assignee shall account to the Court and pay over all moneys and deal with all securities in such manner as is prescribed or as the Court directs."

The powers and duties of the Official Assignee fall into two categories. Those in sub-section 1, clauses (*a*) and (*b*), can be exercised without the Official Assignee seeking the leave of the Court. But in regard to the others described in clauses (*c*) to (*i*) the section says that he may do all or any of them by leave of the Court. The point that arises for consideration is whether and how far the omission of the Official Assignee to seek and obtain the leave of the Court affects the validity of acts done by the Official Assignee under clauses (*c*) to (*i*) aforesaid, more particularly the question of the validity of compromises entered into by him without leave of Court

It may at once be mentioned that clause (*h*) does not make any distinction between compromises of claims in suits already instituted and those in respect of claims not brought before the Court. The contention of the respondent is that the absence of leave does not render the act of the Official Assignee invalid or inoperative; only the Official Assignee will lose the benefit of a protection he would have got for himself had he obtained the leave. At first sight the proposition may seem, as it did seem to me, to run counter to the language of the section. But a consideration of the history of this section and of the principle underlying it, as explained by the Bankruptcy Court in England in cases which have come before it on similar provisions in the English Bankruptcy Acts, has convinced me that the respondent is right.

In *Lee* v. *Sangster*[1], the Court had to consider the effect of section 153 of the Bankruptcy Act, 1849—12 and 13 Victoria, Chapter 106, which enacted that the Assignees with the leave of the Court upon application to such Court, but not otherwise, may commence, prosecute or defend any action at law or any suit in equity which the bankrupt might have commenced, prosecuted or defended and in such cases the costs to which they may be put in respect of such suit or action shall be allowed out of the proceeds of the estate of the bankrupt. The action was one brought in the name of the Official Assignee for the recovery of a debt due from the defendants to the bankrupt and had been commenced without obtaining the leave of the Court. The defendants moved for a rule calling upon the plaintiff to show cause why all proceedings in the case should not be stayed on the ground that the action had been brought without first obtaining the leave of the Court pursuant to section 153 of the Bankruptcy Act aforesaid. It was urged that the object of the section manifestly was to prevent the estate of the bankrupt from being squandered by bringing reckless actions. For the plaintiff it was answered that the section merely enacted a provision for the internal management of the bankruptcy and the only persons who could complain of a breach were the creditors and such breach could not be made the ground of objection by the defendants. The point being a new one, the Court took time to consider it but in the end pronounced its judgment discharging the rule. Williams, J., who delivered the judgment of the Court, conceded that the language of the section at first sight appeared strongly to support the rule. But on consideration the learned Judge was of opinion :

"..... that the statute intended to make the obtaining of the requisite leave a matter only between the assignees and the Court of bankruptcy, and not at all between the assignees and the other party to the suit. The enactment, it must be observed, extends to the defence by the assignees of actions which the bankrupt might have defended, as well as to the commencement and prosecution of actions which he might have commenced and prosecuted. And, if the assignees were to defend such an action without having obtained the leave of the Court of bankruptcy, it is difficult, if not impossible to suggest how the Court of Common Law in which the action was pending could interfere with the defendant's proceedings."

The learned Judge also explained that the neglect of the Official Assignee to obtain the requisite leave would only result in his not being allowed his costs out of the bankrupt's estate and might also subject him to the disciplinary jurisdiction of the Court.

Leaming v. *Lady Murray*[2] is a case in which the Court had to construe the effect of section 27 of the Bankruptcy Act of 1869—32 and 33, Victoria, Chapter 71—which ran as follows :—

"The trustee may, with the sanction of the committee of inspection, do all or any of the following things :—

(1) Mortgage or pledge any part of the property of the bankrupt for the purpose of raising money for the payment of his debts ;

(2) Refer any dispute to arbitration, compromise all debts, claims and liabilities, whether present or future, certain or contingent, liquidated or unliquidated, subsisting or supposed to subsist between the bankrupt and any debtor or person who may have incurred any liability to the bankrupt, upon the receipt of such sums, payable at such times, and generally upon such terms as may be agreed upon ;

(3) Make such compromise or other agreement as may be thought expedient with creditors, or persons claiming to be creditors in respect of any debts provable under the bankruptcy ;

---

1. (1857) 2 C.B. (N.S.) 1 : 140 E.R. 310. 2. (1879) 13 Ch.D. 123.

(4) Make such compromise or other arrangement as may be thought expedient with respect to any claim arising out of or incidental to the property of the bankrupt, made or capable of being made on the trustee by any person or by the trustee on any person ;

(5) To divide in its existing form amongst the creditors, according to its estimated value, any property which from its peculiar nature or other special circumstances cannot advantageously be realised by the sale.

The sanction given for the purposes of this section may be a general permission to do all or any of the above-mentioned things, or a permission to do all or any of them in any specified case or cases."

In this case the trustee in bankruptcy brought an action for the recovery of a sum of money due on a policy of insurance effected on the life of the bankrupt. The defendants to the action were the insurance company and also another person who claimed a portion of the insurance amount on a mortgage alleged to have been executed by the bankrupt. The action was settled on a compromise by which the trustee agreed to the payment of a part of the policy amount to the claimant. The trustee having resigned his office, was succeeded by another trustee who refused to be bound by the settlement on the ground that neither the consent of the committee of inspection nor of the Court of bankruptcy had been obtained for the arrangement, and accordingly commenced the action for the recovery of the money paid to the claimant. The defendant having demurred, Jessel, M.R., upheld the demurrer on the ground that the power conferred by the section was a power for the trustee to do certain things so as to bind the creditors of the bankrupt and the creditors only, and that the case was not dissimilar to a compromise made by him out of Court in which case a person taking under the compromise would not be entitled to say that the trustee made it without the consent of the committee. To some extent the decision is complicated by a reference to section 83 of the Act of 1869 which conferred a power on the trustee to sue and be sued without the consent of the committee and by the further circumstance that there was an order of Court made on consent in the way. But I do not think that this affects the correctness of the principle which underlies the decision. This is made clear by the decision in In re *Branson*: Ex parte *The Trustee*[1], in which the Court had before it "an application by the trustee for an order that the debtor's solicitors should deliver up to him all books, papers, and documents in their possession belonging to the bankrupt together with a full cash account showing the dealings" with him. The sanction of the committee of inspection had not been obtained at the time when the motion was commenced, indeed no committee of inspection had been appointed at the time, but the defect was made good later, and the question resolved itself into a question of costs as the defendants expressed their readiness to comply with the motion. Section 57 of the Bankruptcy Act of 1883—46 and 47 Victoria, Chapter 52—contained the following provision :—

"The trustee may, with the permission of the committee of inspection, do all or any of the following things :

(1) Carry on the business of the bankrupt, so far as may be necessary for the beneficial winding up of the same ;

(2) Bring, institute, or defend any action or other legal proceeding relating to the property of the bankrupt."

Horridge, J., stated the point for decision in the following words :—

"The question is whether the obtaining of that sanction is a matter for the protection of the estate so that the trustee may not incur solicitors' costs without getting the sanction of the committee, or whether the section creates a condition precedent to the right of the trustee to take proceedings against any third parties."

The learned Judge's decision was

"that the obtaining of the consent of the committee of inspection to the taking of proceedings is merely a provision for the protection of the estate and is not one which the respondent or the defendant in any proceedings by the trustee is entitled to avail himself of in answer to those proceedings."

The effect of these cases is, in my opinion, to lay down the proposition that the want of leave does not vitiate the act of the Official Assignee or render it null and void as between him and third parties, whatever its consequence may be in relation to his right to get his costs, charges and expenses out of the estate.

1. (1914) 2 K.B. 701.

There are also a few Indian decisions to which reference may be made. In *Laduram Nathmull* v. *Nandalal Karuri*[1], the facts were these: The mortgagee under certain mortgages executed by an insolvent brought suits to enforce them, impleading the Official Assignee as a party. The subject-matter of the suits was referred to arbitration with the consent of the Official Assignee and an award came to be passed. The award was attacked on the ground that the Official Assignee had not obtained the leave of the Court before consenting to the reference. Rankin, J., as he then was, accepted the principle of the English decisions referred to above and observed:

"The Official Assignee is a person in whom there is vested by law all the property of the bankrupt; it is his property, of course not that he may deal with it for himself, but that he may deal with it as a trustee for the benefit of the creditors, but in law it is his property; and it seems to me to be settled now by the authorities, that those provisions which have come into our Insolvency Act from the English Act, and which require the leave of the Court, are administrative provisions only; they are matters between the Court and the trustee; they are matters which may give creditors personal rights of action against the trustee; they are not matters which can be set up when the trustee as the person in whom the bankrupt's property is vested is meeting his enemy in the gate and is at arm's length with the third party outside the bankruptcy altogether. That seems to be the result of *Lee* v. *Sangster*[2], the other case which was decided by Sir George Jessel, *Leaming* v. *Lady Murray*[3], and the last case before Horridge, J., In re *Branson*: Ex parte *The Trustee*[4]. I do not think it is a matter with which the other party to an action has any concern at all, whether the trustee has behaved himself *vis-a-vis* his Court, *vis-a-vis* his constituents the creditors, or whether he has done that which he is not strictly entitled to do. They are entitled to look to the trustee just as they would be entitled to look to the insolvent had he never been adjudicated, and I am, therefore, against Mr. Sircar's contention that the Official Assignee having assented to this submission on his own authority the award is invalidated by reason of that fact."

The learned Judge, however, felt bound to set aside the award upon other grounds. An appeal was preferred against the decision of Rankin, J., but the point did not arise in the appellate Court and there is therefore nothing said in its judgment on it. In *The Official Receiver, Coimbatore District* v. *Kanga*[5], which was a case which proceeded on the language of section 20 of the Provincial Insolvency Act III of 1907, Spencer and Ramesam, JJ., held, following the English decisions referred to above that, where an Official Receiver institutes a suit without the leave of the Insolvency Court, it is not a valid defence to the suit to say that such leave had not been obtained. The obtaining of the leave was held to be a matter between the Receiver and the Court whose officer he was, and the want of leave could not be relied on by defendants in a suit, the only result being that the Official Receiver would be prosecuting the suit at his own risk in the matter of costs and cannot charge them on the insolvent's estate if he loses.

A contrary note appears to be struck in *C. E. Grey* v. *Lamond Walker & Co.*[6], which was decided by Fletcher, J., sitting on the original side. The suit was one by the Official Assignee to recover damages from the defendant company for failure to deliver goods in pursuance of certain forward contracts entered into by the insolvent. After holding that the Official Assignee was in fact carrying on the business of the insolvent in respect of these contracts, the learned Judge doubted whether the Official Assignee had the power to do so without the sanction of the Court. He observed,

"that the only two powers that he (the Official Assignee) has got in acting of his own motion are, first of all, to sell the property and, secondly, to give receipts"

But the expression of this opinion was not only *obiter*, but made without reference to the decided cases on the point.

In the light of the decisions referred to above, I am convinced that the settlement arrived at between the Official Assignee and the respondent is valid and binding on the parties and that effect must be given to it. My direction to the Official Assignee is that he is bound to fulfil the terms of the settlement. The Official Assignee will pay the costs of the respondent out of the estate in his hands.

B.V.V. —— *Order made.*

1. (1919) I.L.R. 47 Cal. 555 at 557.
2. (1857) 2 C.B. (N.S.) 1: 140 E.R. 310.
3. (1879) 13 Ch.D. 123.
4. (1914) 2 K.B. 701.
5. (1921) 42 M.L.J. 53: I.L.R. 45 Mad. 167.
6. (1913) 17 C.W.N. 578.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ABDUR RAHMAN.

Kovvuri Satyanarayanamurthi and others .. *Appellants** (*1st Deft. and L.Rs. of the 2nd Defendant*)

v.

Tetali Pydayya and others .. *Respondents* (*Plffs. 1 to 3 and Defts. Nos. 3, 4 and 5 and L.R. of 2nd Defendant*).

Transfer of Property Act (*IV of 1882*), *section 41—Scope and applicability—Evidence Act, section 115—Applicability.*

Some items of properties stood in the name of the mother of certain minors even during her husband's lifetime and were mortgaged by her. There was a mortgage decree followed by a Court-sale. When the purchasers attempted to take possession, they were resisted by the minors on the ground that the properties were their joint family properties and their mother was merely a benamidar and consequently had no right to effect any valid mortgage of those properties. The executing Court directed the obstruction to be removed and a suit was instituted under Order 21, rule 103, Civil Procedure Code. The plea of *benami* was found in favour of the minor children. On the question whether section 41 of the Transfer of Property Act can afford any protection to the purchasers,

Held : Under section 41 of the Transfer of Property Act, the ostensible owner must be found to have been holding the property in his or her name with the consent, express or implied of the persons interested in it. And when those persons consist of minors, and one of them is found not to have been born even at the time of the mortgage, such consent must be found to be wanting.

Shankar v. *Daooji Misir*, (1931) 61 M.L.J. 212 : L.R. 58 I.A. 206 : I.L.R. 53 All. 290 (P.C.), relied on.

Section 41 of the Transfer of Property Act does not however require that the transaction to be binding upon the real owners must have been entered into with their consent. Their knowledge of the ostensible ownership of the person dealing with the property will suffice.

Fazal Hussain v. *Muhammad Kazim*, (1933) I.L.R. 56 All. 582 and *Jesa Ram* v. *Ghulam*, A.I.R. 1936 Lah. 816, approved.

Safiq-ullah Khan v. *Samu-ullah Khan*, (1929) I.L.R. 52 All. 139, disapproved.

The alienee of the interest of a Hindu coparcener is entitled to enforce his claim against the share to which the alienor was entitled at the time of the alienation undiminished by any birth or death in the family subsequent to the date of the alienation. The same principle applies to cases of equitable protection afforded by section 41, Transfer of Property Act and the title of the alienee has to be considered with reference to the date of the transfer which could not be avoided by him or by his legal representatives—either heirs or survivors—if the other conditions of that section are found to have been complied with. The share could not be diminished by any subsequent addition of coparceners.

Appeal against the decree of the District Court of East Godavari at Rajahmundry in Appeal No. 25 of 1939, preferred against the decree of the Court of the Subordinate Judge of Rajahmundry in O. S. No. 14 of 1937.

P. Somasundaram for Appellants.

K. Umamaheswaram for Respondents.

The Court delivered the following

JUDGMENT.—The other question as to the benami or fictitious nature of certain transactions having been, as I would show later, concluded by a finding of fact arrived at by the lower appellate Court the only real question to decide in this second appeal is whether section 41 of the Transfer of Property Act and section 115 of the Indian Evidence Act can afford any protection to the appellants-defendants 1 and 2 and if so, to what extent?

The plaintiffs and the defendants 4 and 5 in the suit out of which this appeal has arisen are the sons of one Kamaraju who died some years ago. Their mother Sooramma figures as the third defendant in the present litigation. A sale deed in respect of item 1 out of the properties described in the plaint schedule was executed on the 12th April, 1910, in her favour (Ex. A). The second item in the plaint schedule is a seventeenth share in a rice mill while items 3 and 7 are houses and house sites purchased by the third defendant on the 22nd September, 1918, from her husband Kamaraju acting for himself and on behalf of his minor sons (plaintiffs 2 and 3 and defendant 4) and the first plaintiff (Ex. A-1). All the seven items were

*S. A. No. 953 of 1941. 2nd October, 1942.

first of all mortgaged by Sooramma, the 3rd defendant, in favour of Venkayya (father of the present defendants 1 and 2) for a sum of Rs. 4,000 on the 6th June, 1919 (Ex. X). This was discharged by the 17th August, 1931 and we are no longer concerned with it. During the pendency of this mortgage, another mortgage was created by Sooramma in respect of the seven items of the property in favour of Venkayya, the previous mortgagee on the 11th June, 1921 (Ex. VI). This was for a sum of Rs. 12,000. It appears from this deed that the money was borrowed for purchasing certain properties evidenced by Ex. I, Ex. II, and Ex. XI, the properties so purchased having been also given as security along with the seven items covered by the first mortgage Ex. X.

A suit was instituted by Venkayya during his lifetime on the basis of the mortgage deed (Ex. VI) in the Court of the Subordinate Judge of Rajahmundry (O. S. No. 43 of 1932). Venkayya died during the pendency of this suit and the defendants 1 and 2 were brought on record as his legal representatives. This suit was decreed. In execution of that decree, the seven items of the property mentioned above were sold and purchased by these defendants, through Court. But when they attempted to take possession, they were resisted by the plaintiffs and the defendants 4 and 5 on the ground that the properties were their joint family properties, that Ex. A was *benami*, that Ex. A-1 was fictitious and that their mother Sooramma had consequently no right to effect any valid mortgage in respect of those properties. As the execution Court was satisfied that the resistance was occasioned by the sons of Sooramma without any just cause, it directed the obstruction to be removed and the defendants 1 and 2 to be put into possession of the property purchased by them in execution. This led to the institution of the suit under Order 21, rule 103, Civil Procedure Code. It was dismissed by the first Court but was decreed by the lower appellate Court in regard to item one of the property (covered by Ex. A) as the plaintiffs' allegations in regard to the *benami* nature of the transaction were held to have been established. The defendants 1 and 2 (the decree-holders in O. S. No. 43 of 1932) have consequently preferred the present appeal in regard to that item of the property while the plaintiffs and the defendants 4 and 5 have filed cross-objections in regard to the other remaining items.

Having heard learned counsel for the defendants-appellants in regard to the *benami* nature of the transaction covered by Ex. A, I am of opinion that the finding in regard to that question is purely one of fact and cannot be questioned in this appeal. The promissory notes which formed the consideration for the sale deed (Ex. A) have been, although described in the sale deed to be in favour of Sooramma now found to be in favour of Kamaraju and there being no presumption as to advancement in India, the sale deed must be, in the absence of anything else that would suggest to the contrary, found to be *benami* in character. There is no force, therefore, in the contention that the property covered by Ex. A belonged to Sooramma herself.

It was, however, contended by Mr. Somasundaram, learned counsel for the appellants, that the transaction covered by Ex. A could not be avoided as Sooramma was with the consent, express or implied, of Kamaraju and his sons, the ostensible owner of the property described therein and that the mortgage was taken by Venkayya not only for consideration but also in good faith and after he had taken reasonable care to ascertain that she had the power so to do. This contention has no force in regard to the second and third plaintiffs and defendants 4 and 5 as the first three were minors at the time when the mortgage (Ex. VI) was effected in favour of Venkayya and the fifth defendant had not been even born then. Under the terms of the section, the ostensible owner must be found to have been holding the property in his or in her name with the consent, express or implied, of the persons interested in it. And when those persons consist of minors, and one of them is found not to have been born at the time of the mortgage, this consent without which the provisions of section 41 cannot be attracted, must be found to be wanting. It was so held by their Lordships of the Privy Council in *Shankar* v. *Daooji Misir*[1]. The appellants'

1. (1931) 61 M.L.J. 212 : L.R. 58 I.A. 206 : I.L.R. 53 All. 290 (P.C.).

contention should be, for that reason, repelled to that extent. As for Kamaraju's share in the property which he owned during his lifetime the lower appellate Court has failed to consider the effect his consent must be held to have on the mortgage to the extent of that share. It was found by the learned Subordinate Judge—and the finding was not questioned by the learned District Judge—that the transactions covered not only by Ex. VI but also by Ex. X were brought about by Kamaraju himself. It must not be overlooked that Kamaraju was a member of the joint family (in fact he was the *kartha*) at the time and if the transactions were brought about by him as appears to be the case, he would have been, if alive, estopped from objecting to the validity of the mortgage—at least so far as his own share was concerned. That would be so under the clear terms of section 115 of the Indian Evidence Act. If Kamaraju had by his acts and representations in going to Venkayya and asking him to advance a loan on the security of these properties caused him to believe that it was owned by Sooramma and to advance the money to her upon such belief, the former (*i.e.*, Kamaraju) or his representatives could not be allowed to deny the truth of that representation to the extent of his share. Venkayya had been persuaded by Kamaraju's conduct or representations to believe that Sooramma, the *benamidar* was the real owner of the property and had acted upon that belief to his detriment. In this view he and after him his representatives must be held to have been estopped from asserting his or their title against the *bona fide* transferee from the ostensible owner and could not be permitted to disclose the real nature of the transaction to the extent of Kamaraju's share. Discussing a case where representations even if erroneous would estop the party making them their Lordships of the Privy Council cited in *Sarat Chunder Dey* v. *Gopal Chunder Laha*[1], the following statement of the general principle by Lord Campbell, L.C., which was made with the full concurrence of Lord Kingsdown in the case of *Cairncross* v. *Lorimer*[2] :

> " The doctrine will apply, which is to be found, I believe in the laws of all civilised nations, that if a man either by words or by conduct has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to that from which they otherwise might have abstained he cannot question the legality of the act he had so sanctioned, to the prejudice of those who have so given faith to his words or to the fair inference to be drawn from his conduct. I am of opinion that generally speaking, if a party having an interest to prevent an act being done has full notice of it having been done, and acquiesces in it so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have had if it had been done by his previous license."

and observed that

> " these words were used with reference mainly to acts indicating only subsequent consent to an appointment which had been made, and which might have been objected to when originally made ; but they apply *a fortiori* in a case like the present, where the person estopped was a party to the transaction itself, which he, or others taking title from him seek to challenge after a considerable interval of time."

For this limited purpose, I need not even go into section 41 of the Transfer of Property Act and it is unnecessary for me to see whether the conditions necessary to attract the provisions of that section exist so far as Kamaraju's share is concerned. Section 41 after all is another species of estoppel when the representation is not made directly to the representee but when it consists in making it possible for the ostensible owners to mislead those with whom they are dealing on account of the special position of vantage in which they were placed by the conduct, express or implied, of the real owners.

The question in regard to the first plaintiff cannot, however, be brought within the ambit of section 115 of the Indian Evidence Act for there is no evidence on the record that he had at any time before the execution of the mortgage (Ex. VI) met Venkayya or made any representations to the effect that the property comprised in the mortgage deed Ex. VI, belonged to his mother. Even the appellants do not allege that fact in paragraph 13 of their written statement. They confine themselves to the statement that the plaintiffs and defendants 4 and 5 " knew of the mortgages in favour of these defendants." The lower appellate Court has not discussed the

1. (1892) L.R. 19 I.A. 203 : I.L.R. 20 Cal. 296 (P.C.).

2. 3 H.L.C. 829.

question whether the first plaintiff was a major at the time of the execution of the mortgage (Ex. VI) or a minor although it seems to have assumed that all the sons of Kamaraju were minors at the time. This is however incorrect. The sale deed (Ex. A-1) was executed by the first plaintiff as a major on the 22nd September, 1918, and there is nothing on the record to show that he was not so on that date. It is highly improbable that if he were only a lad of 14 or 15 in 1918 as he attempted to make it out in his deposition in this case the Sub-Registrar would have admitted it to registration. Moreover, the first plaintiff admitted in his statement as P.W. 5 that he was 7 or 8 years old when the sale deed Ex. A was executed in his mother's favour on the 12th April, 1910. That would show that he was born in 1902 or 1903. Even if that statement is to be believed he must be found to have attained majority before the mortgage Ex. VI was executed. I have discussed this question as the matter was not considered by the lower appellate Court. My finding must therefore be that the first plaintiff was a major before the date of Ex. VI and that he knew that the sale deed of the first item of property in suit (Ex. A) stood in the name of his mother and that she was consequently the ostensible owner of that property. His subsequent conduct in making two payments of Rs. 2,000 to Venkayya on two occasions in April, 1928 and 1929 (Ex. VII and Ex. VII-A) towards the mortgage deed Ex. VI on behalf of his mother, although not relevant to show that he knew of it at the time when it was executed, would show to a large extent that he had in spite of what he swore to the contrary, known on the dates on which he made the endorsements on Ex. VI that she had mortgaged the property in her own name and that he had no desire to challenge her action. If Kamaraju had brought about this transaction—as he seems to have done—if the mortgage Ex. VI was effected to buy property for the family, as Ex. I, Ex. II and Ex. XI clearly indicate, if the first plaintiff was a major and was residing with his parents and had actually executed a sale deed in his mother's favour on the 22nd September, 1918, it is difficult to believe that the first plaintiff did not know that the first item of property stood in his mother's name. If therefore the transaction in favour of Venkayya was for consideration as it has been found to be and Sooramma is held to be the ostensible owner of the property with the express or implied consent of the first plaintiff, the only question is whether Venkayya had acted in good faith and whether he had taken reasonable care to ascertain that she had power to make the transfer.

But before I go into that question, I might advert to the interpretation which was attempted to be placed on section 41 of the Transfer of Property Act by Mr. Umamaheswaram, learned counsel for the respondents. He contended that not only must Sooramma be found to have been the ostensible owner with the express or implied consent of the first plaintiff but that the mortgage deed (Ex. VI) in favour of Venkayya should be held to have been effected with his consent as well before the terms of section 41 can be held to apply. In support of this interpretation, he relied on certain observations of Sulaiman and Pullan, JJ., in *Shafiq-ullah Khan* v. *Sami-ullah Khan*[1]. But I find that this interpretation was not accepted by another Bench of the same Court in *Fazal Hussain* v. *Muhammad Kazim*[2] and was regarded to be in the nature of an obiter. The interpretation that section 41 required that the transaction to be binding upon the real owners must have been entered into with their consent did not find favour with Mulla in his well-known commentary on the Transfer of Property Act (2nd edition) where the observations in the case of *Shafiq-ullah Khan* v. *Sami-ullah Khan*[1] were adversely criticised and it was pointed out that the section would apply when the person, who, with the consent, express or implied, of the real owner, was in the real position of the ostensible owner and made a transfer of which the real owner was unaware. The same view was taken by Tek Chand, J., in *Jesa Ram* v. *Ghulam*[3]. I find myself in respectful agreement with what was said by the learned Judges of the Allahabad High Court in *Fazal Hussain's case*[2] or what was observed by Tek Chand, J., in *Jesa Ram's case*[3] and hold that in order to attract the provisions of section 41 of the Transfer of Property

1. (1929) I.L.R. 52 All. 139.
2. (1933) I.L.R. 56 All. 582.
3. A.I.R. 1936 Lah. 816.

Act, it is unnecessary that the defendants must also have shown that the mortgage by Sooramma in favour of Venkayya was executed with the first plaintiff's knowledge and consent—his knowledge that Sooramma was the ostensible owner of the property before Ex. VI came into existence being enough for the purposes of this section.

Nothing has been said by the lower appellate Court or by learned counsel for the respondents that would lead me to suspect the *bona fides* of the transaction. The only question then is whether Venkayya can be, in the circumstances of this case, held to have taken "reasonable care to ascertain that the transferor had power to make the transfer." As observed by the learned Judges in *Fazal Hussain's case*[1]:

"no hard and fast rules can be laid down as regards the extent to which a transferee from the ostensible owner should take reasonable care to ascertain that the transferor had power to make the transfer."

Each case would have to depend on its own circumstances. According to the learned Judges in this case,

"the only test that can be laid down is that the transferee should show that he acted like a reasonable man of business and with ordinary prudence."

In order to ascertain what would have been reasonable care in the circumstances of the case, it is not easy to ignore that the mortgage deed—which by the way was a second one executed by Sooramma the first one being Ex. X—was being executed by her with the active support of Kamaraju who was the *kartha* of the family. Had Kamaraju not been referred to, in spite of his having been alive, by Venkayya when the mortgage was taken, the position would have been very different. But once it is found that the mortgage Ex. VI was being brought about by Kamaraju himself as he had brought about the previous mortgage Ex. X, and the mortgage deed contained a statement (although not found to be true now) that the promissory notes in consideration of which the sale deed Ex. A was executed were in favour of Sooramma and the money under them had been due to her, the only inquiry which could be, in the circumstances of the case regarded to have been proper was from Kamaraju himself and inasmuch as Kamaraju was bringing about this transaction, there was nothing to suggest any reasonable doubt that Sooramma was the real owner of the property and had a right to effect the mortgage. The fact that she was mortgaging it for the purpose of purchasing certain other property (Ex. I, Ex. II and Ex. XI) and that Venkayya was required to pay the money to the vendors himself was a further circumstance which could not but have influenced an ordinary prudent man and a reasonable man of business to come to the conclusion that Sooramma was the real owner of the property and was by taking the loan from him adding to the family wealth and thus promoting its interests. These circumstances are in my opinion amply sufficient to bring the case within the purview of section 41 of the Transfer of Property Act and establish such *bona fides* and reasonable care as are required by that section. From the decision of their Lordships in *Sarat Chunder Dey's case*[2] to which I have already referred, it appears that the only ground taken in second appeal before the High Court was that the plaintiff could not recover the property as his assignors Ahmed Hussein and Rahimunnissa were estopped from disputing the validity of the hiba in favour of Arju Bibi. The High Court had disallowed this contention. In overruling the decision of the High Court on this point, their Lordships observed at p. 308 :

"But inquiry, or indeed any anxiety as to the title of Arju Bibi to grant the mortgage as proprietor in virtue of the hiba in her favour was made quite unnecessary by the representation and conduct of Ahmed who was (so far as his share of the property was concerned) the sole person having a title or interest to challenge the validity of the hiba, and to object to the granting of the mortgage which he himself signed and delivered in exchange for the money paid to him."

If Kamaraju was the kartha of the family as he was and there was nothing to suggest that he was acting in any manner adversely to the interests of the family, his participation with Sooramma in bringing about the transaction should, in my view, make any further inquiry unnecessary and the further demand for the production of the original promissory note, in consideration of which the sale deed Ex. A was executed,

1. (1933) I.L.R. 56 All. 582.
2. (1892) L.R. 19 I.A. 203 : I.L.R. 20 Cal. 296 (P.C.).

on which stress was laid by Mr. Umamaheswaram, not essential. There was nothing to suggest that after being satisfied, they were preserved by either the vendor or the vendee.

I am, for the above reasons, of opinion that the first plaintiff is not entitled to question the validity of the mortgage in favour of Venkayya. The first plaintiff's share in the property was both on the date of the mortgage and on the date of the suit one-fifth. He is one of the five brothers who are parties to this action.

The question then is as to what should be regarded to be Kamaraju's share. Mr. Somasundaram contends that inasmuch as the fifth defendant was not born at the time when the mortgage Ex. VI was executed, Kamaraju's share should also be held to be one-fifth as he had only four sons living at the time. In support of this contention he relied on the principle of the decisions in *Chinnu Pillai* v. *Kalimuthu Chetti*[1] and *Sree Rajah Vasi Reddi* v. *Mallela Lakshminarasimham*[2], to the latter of which I was a party. It was held in these cases that the alienee of the interest of a Hindu coparcener is entitled to enforce his claim against the share to which the alienor was entitled at the time of the alienation undiminished by any birth or death in the family subsequent to the date of the alienation. No objection was taken by the learned counsel for the respondents as to this proposition but he urged that this principle could not be applied to cases of equitable protection afforded to a party under section 41 of the Transfer of Property Act. He argues that in so far as the vendor's share was one-sixth at the time of his death and if Kamaraju were alive, the sons could claim five-sixth share in the property, Kamaraju's share must be held to be one-sixth under the circumstances and not one-fifth. I am, however, not impressed with this contention as in my view not only according to the above decisions the principles of which do, in my opinion, apply to the present case but also according to the words used in section 41 of the Transfer of Property Act, the title of the alienee has to be considered with reference to the date of the transfer which could not be avoided by him or by his legal representatives—either heirs or survivors—if the other conditions of that section are found to have been complied with. If Kamaraju had one-fifth share on the date of the transfer the fact that he had one or more sons subsequently born to him and his share was accordingly diminished would not be, in my judgment, material. It is the alienation made by him which cannot be successfully challenged and that transfer was apparently that of one-fifth.

For the above reasons the appeal must be accepted to the extent of two-fifths' share in the first item of the property covered by Ex. A. To that extent the decree of the lower appellate Court will be modified both in regard to the property and as to the mesne profits. The appellants will receive and pay proportionate costs according to their success and failure in all the Courts.

As for the cross-objections, I find no force in them as they are concluded by concurrent findings of both the Courts. Mr. Umamaheswaram urged that the lower appellate Court failed, in spite of its decision in regard to the item covered by Ex. A in favour of the plaintiffs, to consider that Sooramma's income could not have been sufficient to enable her to acquire other properties under Ex. A-1. But I do not agree that the lower appellate Court was unmindful of that fact. Sooramma had admittedly some property of her own and there is nothing to suggest that she could have no funds to make the other purchases. The finding by the lower appellate Court on this point is one of fact and it is not open to me to interfere with it in second appeal. The cross-objections fail and are dismissed with costs.

Leave to appeal refused.

K.S. ——— *Appeal allowed in part.*

---

1. (1911) 21 M.L.J. 246 : I.L.R. 35 Mad. 47 (F.B.).
2. (1940) 1 M.L.J. 820 : I.L.R. (1940) Mad. 913.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ABDUR RAHMAN.

Natesa Nilangiriyar .. *Appellant** (*Plaintiff's L. R.*)

v.

V. Raju Mudaliar .. *Respondent* (*Defendant*).

Civil Procedure Code (*V of 1908*), *Order 21, rule 57* (*as amended*)—*Attachment before judgment of properties lying in two distinct jurisdictions—Default of decree-holder in execution application relating to one set of properties—Dismissal by Court—Order of dismissal affecting only property lying within jurisdiction of such Court.*

There is no warrant for the proposition that a decree-holder's default in the conduct of an execution application for the sale of one property situate in the jurisdiction of one Court may entail the consequence of the termination of the attachment of a property situate within the jurisdiction of another Court, simply because both the properties situated within the jurisdiction of two Courts happened to be attached by one order passed before judgment. There is no reason to extend the scope of the sanction provided in the last sentence of rule 57, Order 21, Civil Procedure Code, which was apparently enacted to deal with those properties alone in regard to which the application was made and which were attached in consequence of it.

Where by one order, attachment before judgment of properties within two distinct jurisdictions was effected and a later order of one of the Courts on an execution application dismissed the attachment as regards the properties within its own jurisdiction,

Held, that by an application for sale made in one of the two jurisdictions, the decree-holder can only be held to have the property within the jurisdiction of that Court proceeded against in execution and if that application was dismissed by the Court in consequence of the decree-holder's default, the attachment in that Court and in that Court only should be held to have ceased.

Appeal against the decree of the Court of the Subordinate Judge of Cuddalore, dated 18th November, 1940 and passed in A. S. No. 45 of 1940, preferred against the decree of the Court of the District Munsiff of Chidambaram in O. S. No. 900 of 1935.

K. Parasurama Aiyar for Appellant.

M. S. Venkatarama Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—The only questions that fall to be determined in this second appeal are,

(*a*) whether the attachment before judgment of the lands situate at Chidambaram can be held to be an attachment in execution of the decree, although no application was made for their sale but only for the sale of other lands situate at Cuddalore which were also attached before judgment by the same order?

(*b*) Did the attachment before judgment cease to exist in respect of Chidambaram properties when the application in execution was dismissed in regard to those situate at Cuddalore?

The two questions separately formulated for the sake of clearness depend for their answer on the first one. If the answer to that question happens to be in the affirmative, the answer to the second one would also be the same. But if the answer to the first question is in the negative, the reply to the second would have to be similar and this appeal will have to be, in that case, rejected.

The facts which lead up to the present appeal may be now stated. Two suits were instituted at Cuddalore against the same person in 1920. The plaintiff brought one (O. S. No. 27 of 1920) for the recovery of Rs. 4,800 in the Court of the Subordinate Judge while the defendant brought the other (O.S. No. 409 of 1920) for Rs. 1,878 in the Court of the District Munsiff. The plaintiff in the latter suit (who is the defendant in the present litigation) had obtained an attachment before judgment against his defendant's lands situate at Cuddalore and Chidambaram. Both the suits were decreed in due course. There is a concurrent finding of both the lower Courts that the present defendant had, in the first instance, applied for execution against properties situate in Cuddalore alone but this application was finally dismissed without satisfaction on the 20th December, 1928. An attempt was made by learned counsel for the appellant to challenge this finding but being a finding

*S. A. No. 530 of 1941. 24th July, 1942.

of fact and having regard to the application which the defendant had subsequently made for the attachment of Chidambaram lands only, I am of opinion that this decision could not be challenged in second appeal and was, in my opinion, correctly decided. This view was expressed by me during the arguments which subsequently proceeded on that assumption.

It is not denied that in view of the provisions of Order 21, rule 57, Civil Procedure Code (as amended in Madras in 1926) and those of Order 38, rule 11, the attachment of lands situate at Cuddalore must be held to have come to an end on the 20th December, 1928, when the application for execution in regard to their sale was dismissed. The defendant had then applied on the 11th November, 1931 (Ex. I) for transfer of his decree to the Court of the Subordinate Judge at Cuddalore to enable him to apply for execution against properties in Chidambaram. But as he had taken no steps to pursue the application and the papers were returned to him by the District Munsiff of Cuddalore who had passed the decree, he applied again on the 10th November, 1932, for transfer of his decree to the Subordinate Judge at Cuddalore. This application was granted and the execution transferred to the Subordinate Judge's Court at Cuddalore where the defendant presented his petition for execution, Ex. D on the 9th December, 1932, and asked for the sale of Chidambaram properties. These were sold and purchased by him (the defendant) on the 4th October, 1934—the sale being confirmed in the following month. The plaintiff had however in execution of his decree in O. S. No. 27 of 1920 already brought the lands situate at Chidambaram to sale, purchased them for a sum of Rs. 3,500 in partial satisfaction of his decree and obtained possession.

The plaintiff objected to the delivery of possession by a claim petition but this was dismissed by the Principal Subordinate Judge, Cuddalore, on the 14th September, 1934, and an appeal against that order met with the same fate on the 17th October, 1935. The plaintiff therefore brought the present suit out of which the present appeal arises. It was dismissed by the District Munsiff of Chidambaram on the 16th August, 1938, and the order of dismissal was confirmed by the Subordinate Judge of Cuddalore on the 18th November, 1940. Hence this appeal.

It would thus be seen that the same lands at Chidambaram were purchased first by the plaintiff and later by the defendant. The defendant however contended that the sale to the plaintiff although earlier in point of time was ineffectual against him on account of the attachment before judgment issued by the District Munsiff of Cuddalore after the institution of his suit O. S. No. 409 of 1920. This, it was urged, subsisted and became an attachment in execution on his application dated the 10th November, 1932 and the 9th December, 1932, the title by the Court-sale thus passing completely in his favour. On the other hand, it was urged on behalf of the appellant that the dismissal of the application regarding Cuddalore property would, in view of the wordings of Order 21, rule 57, entail the consequence of the cessation of attachment in respect of Chidambaram lands as well. Learned counsel for the appellant contended that in so far as no application for attachment was made by the defendant for about twelve years after the decree was obtained by him in O. S. No. 409 of 1920 on the 13th December, 1920, and the conferment of advantage of attachment before judgment (which could not have created a charge but could only have brought the property *in custodia legis*) was conditional on the defendant's diligence, the privilege to proceed against the property of the judgment-debtor must be held to have ceased on the defendant's default in making the application for such a long time. In short, the contention was that the attachment before judgment must be deemed to have come to an end on the failure of the defendant in pursuing his remedy merely by lapse of time. The harm otherwise caused to *bona fide* purchasers of property for value without notice particularly as there was no system of registration of attachments in this country would be, it was urged by learned counsel for the appellant, serious and very often irremediable. In the end an attempt was made to argue that the attachment must be found to have been waived by the defendant and that the defendant's application, Ex. D, presented on the 9th December, 1932, might have been barred by time. The points, as

waiver and limitation were not raised on behalf of the appellants in the trial Court and no evidence was led by either of the parties in regard to them. It was therefore not possible for me to permit them to be raised for the first time in this appeal. That is why I overruled them and did not call upon the respondent's counsel to say anything in reply in regard to them.

The question whether the attachment before judgment issued by the Court in O. S. No. 409 of 1920 had not ceased to exist on the 20th December, 1928, with the dismissal of the application regarding Cuddalore properties and had continued to subsist on the date when the lands were sold to the plaintiff on the 4th October, 1934, is purely a question of law and the equitable considerations pressed by learned counsel for the appellant are obviously out of place. What does it matter if the system of registration of attachment were not in vogue in this country or if an attachment did not create a charge on the property? After all no attachment could be validly effected unless the judgment-debtor had been prohibited from transferring or charging the property in any way and all other "persons from taking any benefit from such transfer or charge." This order was or must be taken to have been duly proclaimed as required by Order 21, rule 54 (2), Civil Procedure Code. And once that is found or presumed—the proclamation being one of the well-known methods by which the public can be notified—it would be no longer open to any member of the public including the plaintiff to challenge the sale subject of course to the condition that all the other necessary steps required by law to effect an attachment had been taken. Nothing transpired during the trial and nothing has been said here which might lead me to suppose that the attachment was otherwise invalid or ineffective. As to the other points of general consideration raised by learned counsel for the appellant it is wholly immaterial if no title were created by the attachment as long as any further alienation of the property was prohibited and the prohibition must be held to have remained in force as long as the attachment subsisted. Realising this difficulty, learned counsel for the appellant advanced the contention that mere inaction on the part of the decree-holder should be regarded, in the circumstances of the case, as sufficient to discharge the attachment. There is no force in that contention. This is not one of the recognised methods by which the attachment validly effected by a Court ceases to exist. The question of the defendant's absence of due diligence seems by itself to me therefore to be irrelevant. I am not however considering the effect that the defendant's waiver or estoppel would have had on the validity of his sale, had they been pleaded by the plaintiff in time and substantiated by evidence.

There was a divergence of opinion at one time in regard to the interpretation of the words "has been attached in execution of the decree" used in Order 21, rule 57, Civil Procedure Code. Two constructions were being placed upon them. The narrower construction was to the effect that the attachment must have been after and expressly in execution of the decree and therefore when an application for execution was dismissed, that attachment alone which had been effected after the decree had been passed would come to an end. According to the wider construction, a property was considered to have been attached in execution of a decree even though the date of the actual attachment might have been before the judgment and therefore the dismissal of an application for execution on account of the decree-holder's default would entail the consequence of the cessation of the attachment even if effected before judgment. This was in virtue of the joint reading of the aforesaid section with Order 38, rule 11, Civil Procedure Code. The latter construction was accepted by a majority of the Full Bench of this Court in *Meyappan Chettiar* v. *Chidambaram Chettiar*[1] and it was held that the property attached in execution included the property attached before judgment when the judgment was followed by a decree in favour of the plaintiff and the decree had been followed by an execution petition for the purpose of bringing the attached property to sale or in the words of Ramesam, J., "when it is definitely sought to be made liable for execution." It would therefore follow that upon the dismissal of that appli-

1. (1923) 46 M.L.J. 415 : I.L.R. 47 Mad. 483 (F.B.).

cation, the attachment effected either before or after judgment must be held to have come to an end. Placing reliance on this decision, learned counsel for the appellant contended on the one hand that with the dismissal of the application on the 20th December, 1928, in regard to the property situated at Cuddalore, the attachment before judgment obtained both at Chidambaram and at Cuddalore must be held to have ceased to exist while according to the learned counsel for the respondent on the other, the dismissal of the application on the 20th December, 1928, in regard to the property situated at Cuddalore could have had no effect on the properties situated at Chidambaram that had also been attached before judgment. The real question therefore is whether by making an application for execution in respect of the property situated at Cuddalore, *i.e.*, by making an election to proceed against the properties situated at that place, the decree-holder could be regarded to have manifested his intention to treat the attachment before judgment effected in regard to the property situated at Chidambaram as property attached in execution of his decree as well although in point of fact he had disclosed no such intention. Nor having regard to the fact that the execution Court at Cuddalore had no jurisdiction on the properties situated at Chidambaram was it necessary for him to have done so. If the application for execution in the Cuddalore Court was not for the attachment of the property situated at Chidambaram, as obviously it was not, and if that application was dismissed by the Court on the 20th December, 1928, how can the attachment in regard to the property situated at Chidambaram be held to have come to an end? Learned counsel for the appellant would, in view of the words used in Order 21, rule 57, contend that in so far as the attachments in respect of the properties situated at Cuddalore and Chidambaram were effected by one order, the dismissal of the execution application in respect of the property at Cuddalore would have the legal consequence of also terminating the attachment of the property at Chidambaram. This necessitates an examination of the provisions of Order 21, rule 57, Civil Procedure Code The rule reads as follows :

> "Where any property has been attached in execution of a decree but by reason of the decree-holder's default the Court is unable to proceed further with the application for execution, it shall either dismiss the application or for any sufficient reason adjourn the proceedings to a future date. Upon the dismissal of such application the attachment shall cease."

The following rule has been substituted in this Presidency for rule 57 :

> "Where any property has been attached in execution of a decree and the Court hearing the execution application either dismisses it or adjourns the proceedings to a further date, it shall state whether the attachment continues or ceases : Provided that when the Court dismisses such an application by reason of the decree-holder's default the order shall state that the attachment do cease."

I shall advert to the Madras rule later. But leaving that out of consideration for the time and confining myself to the provisions of rule 57, it would appear that the attachment which is to cease under the last sentence of this rule is only in respect of the property that came to be attached in pursuance of an application for execution but which could not be proceeded with on account of the decree-holder's default. Thus the penalty provided for by the Legislature in the shape of a release from attachment appears to be in respect of that property alone which was attached on the decree-holder's prayer contained in that execution application. If that is the correct construction of this rule, it would seem to follow that the penalty is not to be imposed in regard to applications which were not given or in regard to properties which were not attached by means of a prayer contained in the application for execution that could not be proceeded with on account of the decree-holder's default. In short according to my interpretation "the attachment" only refers to the property which was covered by the application that was dismissed and no further. Order 38, rule 11 renders a re-attachment of the property attached before judgment unnecessary and according to the Full Bench decision in *Meyappan Chettiar* v. *Chidambaram Chettiar*[1], this rule may be read jointly with Order 21, rule 57, with the result that if the application for execution in regard to the property attached before judgment happens to be dismissed on account of the decree-holder's default,

1. (1923) 46 M.L.J. 415 : I.L.R. 47 Mad. 483 (F.B.).

the attachment in regard to that property would cease to exist. But there appears to be no warrant for the proposition that a decree-holder's default in the conduct of an execution application for the sale of one property situate within the jurisdiction of one Court may entail the consequence of the termination of the attachment of a property situate within the jurisdiction of another Court simply because both the properties situated within the jurisdiction of two Courts happened to be attached by one order passed before judgment. There seems to be no reason to extend the scope of the sanction provided in the last sentence of rule 57 which was apparently enacted to deal with those properties alone in regard to which an application was made and which were attached in consequence of that application. Some emphasis appeared to be laid during the course of his arguments by learned counsel for the appellant on the fact that the order of attachment before judgment was passed by the District Munsiff of Cuddalore who had also dismissed the application for execution in regard to property situate at that place. But this to my mind is entirely immaterial. It is the order of dismissal by an execution Court that falls within the purview of rule 57 and the fact that the execution Court happened to be the Court which had issued attachment before judgment appears to be wholly irrelevant. If the contention advanced by learned counsel for the appellant were correct, the dismissal of an application by one execution Court in regard to the property situate within its jurisdiction would have the effect of the termination of attachment in other Courts—they may be two, three or more—whether the order attaching them before judgment was passed by one of the Courts where the properties to be attached were situate or by a Court that had no jurisdiction on any of the properties ordered to be attached before judgment. At all events I see no reason to hold that by making an application for sale of one property within the jurisdiction of one Court, a decree-holder may be deemed to have manifested his intention in regard to the property situated in other districts as well so that those properties might be considered to have been also attached in the execution of his decree. Let me take for instance a case where the value of the property in regard to which an application for execution is given by a decree-holder is, in his opinion, sufficient to satisfy the whole of his decree. Why should a fictitious intention be imputed to the decree-holder in that case and why should he be assumed to have made his election in regard to that property alone so that with the dismissal of that application the attachment of other properties also in other jurisdictions may be regarded to have come to an end? It is more likely in that case that he would not think of proceeding against properties in other districts and the idea of bringing other properties to sale would occur to him only either when he finds it difficult to proceed against the property against which he wished to proceed in the first instance or when the claim is not entirely satisfied by the sale of that property. But suppose the decree-holder has made his application for execution simultaneously in the various districts in which he had the property of his defendant attached before judgment, why should he be deprived of his right to proceed against other properties if his application for execution in one district happens to be dismissed on account of some default of his in that Court? I see no reason to take the view that in spite of the manifestation of the decree-holder's intention to convert the attachment of various properties in various Courts effected in pursuance of an order of attachment before judgment into attachments in execution of his decree, the dismissal of one application in one Court on account of his default may lead the other Courts also to dismiss his applications for execution for the reason that he happened to have committed a default in the execution of his decree in one Court. The real fact is that rule 57 only contemplates an application in regard to the entire property attached in execution of a decree and has no application when only a portion of the property ordered to be attached by a Court could be proceeded against by that application. But when an attachment is effected in pursuance of an order of attachment before judgment, the properties to be attached may be in various places and for the purposes of rule 57, the attachment of every property in every district must be regarded to be the subject-matter of a different attachment, which it undoubtedly and in fact is; ordinarily properties under rule 57 of Order 21, would only be within the jurisdiction of the

Court executing the decree, but that is not so in regard to the properties attached under Order 38, rule 5. The penalty provided under Order 21, rule 57 can therefore only be in respect of the property covered by the application and could not in my opinion entail the consequence of discharging the attachment in regard to the properties to proceed against which there was no application before the Court and which the Court could not for want of jurisdiction entertain. It would therefore follow that by making an application to the Court at Cuddalore the decree-holder can only be held to have the property within the jurisdiction of that Court attached in execution of his decree and if that application was dismissed by the Court on the decree-holder's default, the attachment in that Court and in that Court only must be held to have ceased. This order of dismissal of the application could not have any effect on the property situated at Chidambaram. I am supported in my conclusion by a decision of the Division Bench of the Bombay High Court in *Hari Sabaji* v. *Shrinivas Vithal*[1], where it was held that Order 21, rule 57, necessarily presupposed "an application for execution for attachment and sale of the property," and if therefore there was no application for attachment and sale of a particular property, Order 21, rule 57 would have no application in regard to that property.

The position in Madras is about the same. Under the rule substituted for Order 21, rule 57, it is incumbent upon the Court hearing the execution application to state at the time when it is dismissed or adjourned whether the attachment was to continue or to cease. Under the proviso to that rule however, the Court has no option but to state in its order expressly that the attachment would have to cease if the execution application were to be dismissed on account of the decree-holder's default. Nothing has been said in the order by the Cuddalore Court dismissing the execution application whether the attachment was or was not to cease. This should have been said. But even if there was an express order stating that the attachment had ceased, it could have, as I have held above, only referred to or affected the Cuddalore property attached by that Court alone in pursuance of the order for an attachment before judgment and it was only the attachment of Cuddalore property that was converted on account of the decree-holder's application into an attachment in execution of his decree and when the application was dismissed, the attachment of Cuddalore property and Cuddalore property alone must be held to have ceased.

For the above reasons, I shall answer the questions formulated by me in the beginning of this judgment in the negative. The appeal accordingly fails and is dismissed with costs.

K.C. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BYERS.

N. K. Ramanathan Chettiar .. *Petitioner** (*Counter-petitioner*)

v.

Alamelu Achi .. *Respondent* (*Petitioner*).

Criminal Procedure Code (V of 1898), section 488—Scope—Expenses of medical attention for an invalid wife—If within the word "maintenance."

In the case of a wife who is admittedly an invalid and requires medical attention, it cannot be said that the expenses of a reasonable amount of medical attention appropriate to her status in life are not within the meaning of the word "maintenance" as used in section 488 of the Code of Criminal Procedure.

Petitions under sections 435 and 439 of the Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of the Joint Magistrate of Devakottai, dated 13th July, 1942, and made in M. C. No. 27 of 1942.

---

1. (1931) I.L.R. 55 Bom. 693.

*Crl. R. Cs. Nos. 563 and 766 of 1942. 12th January, 1943.
(Crl. R. Ps. Nos. 536 and 721 of 1942).

K. S. Jayarama Aiyar and *K. Umamaheswaram* for Petitioner in Crl. R. C. No. 563 of 1942 and Respondent in Crl. R. C. No. 766 of 1942.

A. S. Sivakaminathan and *P. Mruthyunjaya Aiyar* for Petitioner in Crl. R. C. No. 766 of 1942 and Respondent in Crl. R. C. No. 563 of 1942.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—The petitioner in Miscellaneous Case No. 27 of 1942 on the file of the Joint Magistrate of Devakottai obtained an order against her husband under section 488, Criminal Procedure Code. for payment of maintenance at the rate of Rs. 75 per mensem. Her husband has come up in revision for the reduction of the amount to the figure offered by him, and the wife has applied for the enhancement of the amount awarded. In arguing the husband's petition Mr. K. S. Jayarama Aiyar has dwelt at some length on the failure of the learned Magistrate to find on the question of neglect or refusal to maintain the wife but it is clear from the order of the lower Court that the petitioner was willing to pay maintenance provided it was fixed at not more than Rs. 250 per annum. When he was asked by the learned Magistrate what he had to say in answer to his wife's claim, he denied the allegations of cruelty and concluded with these words, " as agreed to previously by me; I am willing to pay maintenance to the petitioner at Rs. 250 per annum. I am not in a position to pay the petitioner Rs. 100 per mensem." In view of this statement the pleas of neglect and refusal were abandoned in the lower Court and the case went to trial only on the quantum of maintenance to be awarded. Clearly it is not open to the petitioner at this stage to plead that there has been no finding against him regarding refusal, ill-treatment or neglect and the only question is whether the order of the learned Magistrate fixing maintenance at Rs. 75 per mensem necessitates interference in revision. The learned Magistrate has dealt with at some length with the husband's means and he fixed the sum of Rs. 250 per annum as bare house-keeping expenses. He added to this an equal figure for house rent and a sum of Rs. 150 on account of clothing. There was evidence that the petitioner's wife is an invalid and would require a servant and some provision for medical attendance. The Magistrate therefore added a further sum of Rs. 250 on this head and Mr. Jayarama Iyer has objected to the inclusion of these items as being beyond the scope of section 488 of the Code. In the case of a wife who is admittedly an invalid and requires medical attention, I do not think it can be said that the expenses of a reasonable amount of medical attention appropriate to her status in life are not within the meaning of the word " maintenance " as used in the Code. There does not appear to be anything in the learned Magistrate's order which is incorrect, illegal or improper within the meaning of section 435 (1) of the Criminal Procedure Code. For the same reason it follows that there is no necessity to interfere in revision on behalf of the wife for the enhancement of the amount. Both the petitions are accordingly ordered to be dismissed.

K.S. ——— *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Bollapragada Sarveswararao and another .. *Appellants** (*Defts.*)

v.

Nagumalli Venkata Subbayya carrying on family trade under the name and style of Nagumalli Venkatasubbayya and Sons of Rajahmundry .. *Respondents* (*Plffs.*).

Madras Agriculturists' Relief Act (IV of 1938), sections 8 and 9, proviso—Scope—Debt earlier than date of contract—Right of debtor to scaling down.

The explanation to section 8 of Madras Act IV of 1938 which enables the Court to treat as principal the amount advanced under the earlier debt applies only to proceedings under that section. There is nothing in section 9 which would justify the importation of that rule into the process of scaling down a debt no portion of which was incurred before the 1st October, 1932. The obvious intention of the legislature in enacting the proviso to section 9 (1) was merely to give a rule for the

*Appeal No. 68 of 1941. 22nd October, 1942.

classification of debts into those to which section 8 will apply and those to which section 9 will apply. Consequently, in a given case, where no portion of the debt had been incurred before 1—10—1932, even if the date of the debt is to be deemed to be some date earlier than that on which the contract was actually executed there is no relief which the debtor is entitled to get under section 9 in respect of that debt except the relief of reducing the rate of interest as provided therein.

Seshayya v. *Swamireddi*, (1941) 2 M.L.J. 795 and *Muthusamia Pillai* v. *Sankara Aiyar*, (1942) 1 M.L.J. 86, considered.

Appeal against the decree of the District Court of East Godavari at Rajahmundry in O. S. No. 29 of 1939.

A. Lakshmayya and *I. Sivamoorthi* for Appellants.

M. S. Ramachandra Rao and *D. R. Krishna Rao* for Respondents.

The Judgment of the Court was delivered by

Wadsworth, J.—The appellants were the defendants in a suit based on a settled account. The dealings between the parties began in 1931, but it is quite clear that the balance due as on the 1st October, 1932, was all wiped off by subsequent payments and that the debt remaining at the time of the settlement on the 17th June, 1936, included no portion of that original debt so as to bring the transaction under section 8 of the Madras Act IV of 1938. The settlement of June, 1936, was accompanied by an agreement which is Ex. N. That states that the amount due for principal and interest was Rs. 8,050; the creditor had agreed to give up Rs. 1,400 and the debtor agreed to pay Rs. 6,650 with interest at Re. 0-12-6 per cent. per mensem. It is also provided that this amount shall be repaid in full by the 1st April, 1937, and in default the debtors agreed that the amount of Rs. 1,400 provisionally given up shall be paid by them with interest, that is to say, they agreed in that event to pay the full amount of Rs. 8,050. The debtors failed to make payment in the manner contemplated. Their total payments aggregated to Rs. 2,450, the whole of which was appropriated in the accounts to the principal of the settled debt. On the date on which the default was committed the creditor debited in his account the amount of Rs. 1,400 describing it as 'the balance interest due by you under the terms of the agreement between yourselves and ourselves.' He filed the suit admitting that the defendants were agriculturists and scaling down the debt under section 9 of Act IV on the basis of the principal Rs. 8,050, less payments made, together with interest at 5 per cent. up to the 22nd March, 1938, and thereafter at 6¼ per cent. The actual claim was something less than the amount which would be due on a proper calculation on this basis. The suit was decreed. In appeal it is contended firstly that this amount of Rs. 1,400 is a penalty and secondly that this amount of Rs. 1,400 represents interest at Re. 0-12-6 per cent. per mensem and it has to be scaled down to 5 per cent. per annum.

The first contention is clearly devoid of substance. The amount of Rs. 8,050 was the amount admitted to be due on the 17th June, 1936. The creditor agreed to give a concession to the extent of Rs. 1,400 on a certain condition and the debtor agreed to treat that amount as part of the principal debt carrying interest in case that condition was not fulfilled. It is merely a conditional concession to be automatically cancelled on non-fulfilment of the terms and there can be no question of penalty in such a case.

The argument based on section 9 of Act IV of 1938 really challenges the correctness of the decision of one of us in *Seshayya* v. *Swamireddi*[1], followed in an actual case of accounts, *Muthusamia Pillai* v. *Sankara Aiyar*[2]. It cannot be contended that the sum of Rs. 1,400 is interest due under the agreement Ex. N. This agreement treats the Rs. 1,400 as part of the principal debt created by the settlement. No doubt this sum of Rs. 1,400 historically was made up of interest due on the pre-existing debt. It is contended that the settlement evidenced by Ex. N must be treated as a renewal of the pre-existing debt and that this amount of Rs. 1,400 must be regarded as interest on that debt and scaled down under section 9 to the rate of 5 per cent. as was contended in the decision first quoted. The proviso to section 9 (1) lays it down that any part of the debt which is found to be a renewal of a

1. (1941) 2 M.L.J. 795. 2. (1942) 1 M.L. 86.

prior debt shall be deemed to be a debt contracted on the date on which such prior debt was incurred and if such debt had been incurred prior to the 1st October, 1932, shall be dealt with under the provisions of section 8. This proviso is no doubt intended to enable a debtor whose debt though contracted after the 1st October, 1932, is really a renewal of a debt contracted before the 1st October, 1932, to get the benefit of section 8 of the Act. The way in which this proviso has been worded has given rise to an argument that even when no part of the debt is contracted prior to the 1st October, 1932, the date of the debt will be deemed to be the date on which the original debt was contracted where there is a renewal. Even granting so much, what is the result? The debt to be scaled down is still the debt under the contract. There is no provision in section 9 for the re-opening of this contract except to the extent prescribed in the first part of that section which provides for the reduction of the rate of interest. The explanation to section 8 which enables the Court to treat as principal the amount advanced under the earlier debt applies only to proceedings under that section. There is nothing in section 9 which would justify the importation of that rule into the process of scaling down a debt no portion of which was incurred before the 1st October, 1932. It follows therefore that even if we deem the date of the debt to be some date earlier than that on which the contract was actually executed, there is no relief which the debtor is entitled to get under section 9 in respect of that debt, except the relief of reducing the interest due on the contract, even if we read the first part of the proviso as an independent provision; that is to say, we have a provision which leads nowhere. The obvious intention of the Legislature in enacting this proviso was merely to give a rule for the classification of debts into those to which section 8 will apply and those to which section 9 will apply. The latter class of debts has to be scaled down with reference to the actual contract modified to the extent indicated by the reduction of the rate of interest. In this view it follows that the principal of the suit debt is the sum of Rs. 8,050 which the debtors agreed to pay with interest thereon. The interest has been correctly scaled down.

The appeal is therefore dismissed with costs.

B.V.V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

Ramaswami Naidu .. *Appellant** (*Respondent*)

v.

Chinnaswami Naidu .. *Respondent* (*Appellant*).

Madras Village Courts Act (I of 1889), section 73—Remedy under—Whether by way of appeal—Suit on promissory note in Village Court—Dismissal for absence of parties—Forged endorsement—Petition to District Court to make complaint—Dismissal—Propriety—Criminal Procedure Code (V of 1898), section 195 (3).

There is no appeal against a decision of a Village Court. Section 73 of the Madras Village Courts Act, which empowers the District Munsiff to set aside a decree or order passed by a Village Court, has been inserted in order that a person aggrieved by the improper action of a Village Court may have a remedy but it is not a remedy by appeal. Where a suit on a promissory note was dismissed because the parties did not appear and thereupon the defendant filed a petition to the District Munsiff asking that a complaint should be made by the Munsiff to a Criminal Court on the ground that the endorsements on the promissory note were forgeries, but the Munsiff held that he had no jurisdiction to grant the petition, and thereupon the defendant appealed to the District Court and also filed a petition to the District Court asking the Court to make the complaint, and both were dismissed,

Held, that the District Court was the Court which had jurisdiction under section 195 (3) of the Criminal Procedure Code to make the complaint for the offence complained of and that the dismissal of the petition was not proper.

Appeal under clause 15 of the Letters Patent against the judgment of Happell, J., dated 27th January, 1942 and made in A. A. O. No. 63 of 1941, preferred to the High Court against the decree of the District Court of Salem, dated 8th March, 1940, and made in O. P. No. 94 of 1939.

K. V. Ramachandra Aiyar for Appellant.

D. Ramaswami Aiyangar for Respondent.

---

*L. P. A. No. 25 of 1942. 6th January, 1943.

The Judgment of the Court was delivered by

The Chief Justice.—This is an appeal under clause 15 of the Letters Patent from a judgment of Happell, J. The learned Judge has dealt with the facts and the law in detail and we are in full agreement with his decision.

The appellant instituted a suit on a promissory note in the Panchayat Court of Kadayampatti. The suit was dismissed because the parties did not appear. After the dismissal of the suit the defendant filed a petition in the Court of the District Munsiff of Sankari asking that a complaint should be made by the District Munsiff to a Criminal Court on the ground that the endorsements on the promissory note were forgeries. The District Munsiff held that he had no jurisdiction to grant the petition and consequently dismissed it. The defendant then appealed to the District Court and in addition filed a petition asking the District Court itself to make the complaint. The District Judge dismissed both the appeal and the petition. He was right in dismissing the appeal but erred in dismissing the petition. The District Judge had omitted to notice the amendment in section 77 of the Madras Village Courts Act. The defendant appealed to this Court against the order of the District Judge on the petition. Happell, J., allowed the appeal and directed that the case should be remanded to the District Court for disposal on the merits. The appeal is from that order.

There is no appeal against a decision of a Village Court. Section 73 of the Act empowers the District Munsiff to set aside a decree or order passed by a Village Court if he is satisfied that there has been corruption, gross partiality or misconduct on the part of the Court or that it has exercised a jurisdiction not vested in it by law, or that it has otherwise acted illegally or with material irregularity, or that the decree or order is clearly unjust. This section expressly states that except as provided in it every decree or order of a Village Court shall be final. This section has been inserted in the Act in order that a person aggrieved by the improper action of a Village Court may have a remedy but it is not a remedy by appeal. It is a remedy by a petition to the District Munsiff who is empowered to deal with such a situation.

Section 77 of the Act as amended by the Madras Village Courts (Amendment) Act, 1936, states that the provisions of sections 403, 476, 476-A and 476-B, Criminal Procedure Code, shall apply to a Village Court. Section 476-A, Criminal Procedure Code, reads thus :

> "The power conferred on Civil, Revenue and Criminal Courts by section 476, sub-section (1), may be exercised, in respect of any offence referred to therein and alleged to have been committed in or in relation to any proceeding in any such Court, by the Court to which such former Court is subordinate within the meaning of section 195, sub-section (3), in any case in which such former Court has neither made a complaint under section 476 in respect of such offence nor rejected an application for the making of such complaint ; and, where the superior Court makes such complaint, the provisions of section 476 shall apply accordingly."

Section 195 (1) (*c*) says that no Court shall take cognizance of an offence described in section 463 or punishable under section 471, section 475 or section 476, Indian Penal Code, when the offence is alleged to have been committed by a party to a proceeding in a Court in respect of a document produced or given in evidence, except on the complaint in writing of the Court, or of some other Court to which the Court is subordinate. Sub-section (2) states that in clauses (*b*) and (*c*) of sub-section (1) the term "Court" includes a Civil, Revenue or Criminal Court. Sub-section (3) says,

> "For the purposes of this section, a Court shall be deemed to be subordinate to the Court to which appeals ordinarily lie from the appealable decrees or sentences of such former Court, or in the case of a Civil Court from whose decrees no appeal ordinarily lies to the principal Court having ordinary original civil jurisdiction within the local limits of whose jurisdiction such Civil Court is situate."

As we have already pointed out, no appeal lies from an order or decree passed by a Village Court. Therefore this case falls within the latter portion of sub-section (3) of section 195, and the Court which has jurisdiction is the District Court. It is not to be doubted that in the circumstances the petition lay to the District Court and Happell, J., was right in directing that the petition should be remanded to the

District Judge for disposal on its merits. The appeal fails and will be dismissed with costs.

B.V.V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KING.

Grandhi Venkata Subbarattamma .. *Petitioner* (Plaintiff)*

v.

Grandhi Krishniah and others .. *Respondents (Defendants).*

Hindu Law—Widow's rights under the Hindu Women's Rights to Property Act (XVIII of 1937)—Maintenance in lieu of that portion of property consisting of agricultural property can be claimed.

The Hindu Women's Rights to Property Act (XVIII of 1937) substituted a new and better remedy for the rights which the widow possessed before. But the Act having been held to be ineffective regarding agricultural land, the mere existence of the Act does not put an end to the right of maintenance on the part of the Hindu widow. The obvious position would be that in so far as Act XVIII of 1937 is still valid, the widow may take advantage of it and that in so far as the Act does not take effect upon certain property, the widow's old right of maintenance is restored, the only proviso being that in assessing the amount of maintenance due and proposed to be charged upon agricultural property due allowance should be made for the property which comes to the widow by virtue of Act XVIII of 1937.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge of Bapatla, dated 15th September, 1942, and made in O. S. No. 6 of 1940.

V. Subramanyam for Petitioner.

K. Krishnamurthi for Respondents.

The Court delivered the following

JUDGMENT.—This petition arises out of an order of the learned Subordinate Judge of Bapatla passed in O. S. No. 6 of 1940. The suit was filed for partition by the widow of the brother of the first defendant basing her rights to partition upon the newly enacted Act XVIII of 1937. Before the suit came on for hearing, the Federal Court had decided in a case before them in 1941 that Act XVIII of 1937 was *ultra vires* of the Central Legislature in so far as it referred to agricultural land. The property of which the plaintiff sought partition consisted partly of agricultural land and partly of other property. When the decision of the Federal Court became known, she accordingly applied for permission to amend her plaint and claimed partition of such property as Act XVIII of 1937 was still effective to deal with, and maintenance in addition to that partition. This amendment was at first allowed, but the question whether this double remedy should be given was made the subject of an additional issue and the learned Subordinate Judge found that a decree could not be given for both maintenance and partition. He therefore called upon the plaintiff to elect which remedy she wished to have granted to her. Against that order the present petition has been filed.

It seems to me that the order of the learned Subordinate Judge cannot possibly be justified except perhaps upon the hypothesis that the plaintiff is asking for the full maintenance which she could have got before the Act XVIII of 1937 had been passed, in addition to the partition of the property under that Act. It is argued against this petition that the passing of Act XVIII of 1937 put an end to the widow's right of maintenance and with that argument, thus simply expressed, I am in agreement. It is of course obvious that no woman can take advantage of Act XVIII of 1937 and also ask for additional maintenance. The Act substituted a new and better remedy for the rights which the widow possessed before. But, of course, Act XVIII of 1937 is no longer in the full sense effective. The result of the decision of the Federal Court has been to make the Act a dead letter so far as agricultural land is concerned. The argument is therefore no longer open that the mere existence of Act XVIII of 1937 puts an end to any right of maintenance on the part of a Hindu widow. It need hardly be stated that the Act does not expressly put an end to any such right. The obvious position would seem to be now that in so far as Act XVIII of 1937 is still valid, the widow may take advantage

*C. R. P. No. 1406 of 1942. 7th January, 1943.

of it and that in so far as the Act does not take effect upon certain property, the widow's old right of maintenance is restored, the only proviso being that in assessing the amount of maintenance due and proposed to be charged upon agricultural property, due allowance is made for the property which comes to the plaintiff by virtue of Act XVIII of 1937.

For these reasons, I set aside the order of the learned Subordinate Judge and direct that the trial of the suit do proceed upon the amended plaint with the decision on this particular issue reversed. The costs of this petition must be paid by the respondents.

K.C. ——— *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KING.

Ramachandra Naidu .. *Appellant**

v.

Muthu Chettiar and others .. *Respondents.*

Limitation Act (IX of 1908), Article 182 (5)—Application for execution returned for production of sale papers—Subsequent order of dismissal after refusing adjournment asked for by the decree-holder for production of sale papers—If "final order."

An application which was in accordance with law and presented to the proper Court for execution was returned on more than one occasion for the production of sale papers. Finally a further fortnight's adjournment was asked for by the decree-holder but refused by the Court, which thereupon passed an order dismissing the application.

Held, the order of dismissal is a "final order" within the meaning of Article 182 (5) of the Limitation Act.

Syed Ghulam Khadir Sahib v. *Viswanatha Iyer*, (1942) 2 M.L.J. 768, distinguished.

It cannot be said that no order of any kind can be a "final order" on an application unless that application has been first of all regularly admitted by the Court which disposed of it.

Abdul Majid v. *Jawahirlal*, (1914) 27 M.L.J. 17 : I.L.R. 36 All. 350 (P.C.), distinguished.

Appeal against the order of the Court of the Subordinate Judge of Salem, dated 5th July, 1941, and made in A. S. No. 3 of 1941, preferred against the order of the Court of the District Munsif of Salem, da ed 2nd August, 1940, and made in unnumbered E. P. in O. S. No. 1427 of 1928.

K. P. Ramakrishna Aiyar for Appellant.

O. V. Baluswami and *O. K. Ramalingam* for Respondents.

The Court delivered the following

JUDGMENT.—The question in this appeal is whether an execution application filed in 1940 is in time or not. The final decree was passed in December, 1929, and the application now under consideration is the fifth in order of time. The real question in the case depends upon an examination of the dates and orders on the first execution petition. This was presented on the 7th November, 1932, and was returned on more than one occasion for the production of sale papers. Finally, on the 19th January, 1933, a further fortnight's adjournment was asked for by the decree-holder but refused by the Court, which thereupon passed an order dismissing the application. It is argued in support of this appeal that that order is not a final order within the meaning of Article 182 of the Limitation Act. It is not denied that when the application was presented in November, 1932, it was in accordance with law and presented to the proper Court.

The matter seems to me almost too clear for argument. When a Court definitely dismisses an application for execution, I can see no alternative but to regard that order of dismissal as a final order within the meaning of the article. I have however been shown two rulings in an attempt to convince me that such an order is not a final order after all. One is the ruling of the Privy Council reported in *Abdul Majid* v. *Jawahirlal*[1]. The question there in issue was the date from which the period of limitation began to run ; did it run from the date of the decree of the High Court or did it run from the date of the order of the Privy Council dis-

*A. A. A. O. No. 345 of 1941. 18th January, 1943.

1. (1914) 27 M.L.J. 17 : I.L.R. 36 All. 350 (P.C.).

missing an appeal to it for want of prosecution? It was held by the Privy Council that the dismissal of the appeal to the Privy Council for want of prosecution had the result of placing the appellant in the position which he would have occupied if he had never appealed at all, so that the only decree that existed was the decree of the High Court. It was therefore from the date of that decree that limitation began to run. This is a decision dealing with a matter which is very different from the matter now before me, and I am unable to accept it as authority for the position that no order of any kind can be a final order on an application unless that application has been first of all regularly admitted by the Court which disposes of it. The words which I now have to construe are "the final order passed on an application *made* in accordance with law to the proper Court for execution." Whether the application of 1932 was numbered or not or was admitted or not, there can be no possible doubt that it was made in accordance with law to the proper Court.

The second ruling is of a Bench of this High Court in a recent case reported in *Syed Ghulam Khadir Sahib* v. *Viswanatha Iyer*[1]. Their Lordships had to deal with an execution application which was filed in October, 1933, and was returned for the production of sale papers as in this case. Instead of being returned with or without sale papers, it was held back for a period of three years and was not finally returned until 1936 along with a new execution application. The decree-holder in that case appears to have insisted upon getting some kind of order from the executing Court, which finally in September, 1937, passed an order rejecting the petition of 1933. It was held by the learned Judges that that order was not a final order within the meaning of Article 182. In so holding the learned Judges were following a decision of this Court in *Chidambaram* v. *Murugesam*[2], where it was held that when an execution petition had been presented and had been returned for the remedying of certain defects and was then held back without being returned for a long period it should be regarded as if it had never existed. It was in accordance with that ruling that the learned Judges held that the petition of 1933, which was not re-presented until 1936 had never possessed any real existence or, in other words, had never been pending. It is impossible, I think, to apply this decision to the facts of the present case. Here there was no disobedience of any order of the Court. There were merely two or three requests for adjournments, the last of which was refused. This is a simple case of a petition presented and disposed of within a period of just over two months and it would be impossible to apply the principles of *Chidambaram* v. *Murugesam*[2] to so brief an interval. I therefore see no reason why I should follow the latest Bench decision in this matter as it deals with quite different facts and periods of time, and, as already indicated, I would hold that the order of 19th January, 1933, in this case falls clearly within the scope of Article 182. That being so, the execution petition of 1940 was admittedly filed within time and this appeal must fail and is dismissed with costs.

K.S. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BYERS.

Rajagopala Chettiar .. *Petitioner** (*Respondent*)

v.

Samdum Begum .. *Respondent* (*Petitioner*).

Criminal Procedure Code (V of 1898), section 133—Powers of Magistrate to abate nuisance—Not curtailed by powers conferred on local authorities to abate nuisances under section 44 of the Madras Public Health Act and section 195 of the Madras Local Boards Act.

The powers of a Magistrate to abate a nuisance under section 133, Criminal Procedure Code, have not been curtailed by the powers conferred on local authorities to abate nuisances under section 44 of the Madras Public Health Act and section 195 of the Madras Local Boards Act. There is nothing in section 133 of the Criminal Procedure Code which is in any way in conflict with the corresponding provisions in the two local Acts, the only differences being regarding the powers which the various authorities possess under the different provisions.

1. (1942) 2 M.L.J. 768. Mad. 60.
2. (1939) 2 M.L.J. 671 : I.L.R. (1940)

*Crl. M. Ps. Nos. 743 and 745 of 1942. 22nd January, 1943.

Petitions praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to quash the proceedings in M. C. No. 90 of 1942 on the file of the Court of the Joint Magistrate of Tindivanam as without jurisdiction and to transfer the same to any other competent Magistrate's Court.

K. S. Jayarama Aiyar and *R. Somasundara Aiyar* for Petitioner.

Basheer Ahmed Sayeed for Respondent.

A. S. Sivakaminathan for the Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—The only question which arises for decision in this case is whether the powers of a Magistrate to abate a nuisance under section 133, Criminal Procedure Code, have been curtailed by the powers conferred on local authorities to abate nuisances under section 44 of the Madras Public Health Act and section 195 of the Madras Local Boards Act. The facts are that the Joint Magistrate of Tindivanam issued a preliminary order under section 133, Criminal Procedure Code, calling upon the owner of a local rice mill to cease working the factory or to remove it to some other place, on the ground that it constituted a nuisance in that it affected the health and comfort of the general public living in the locality. In the alternative he was given an opportunity of showing cause against the removal. It may be only a clerical error in the order that he was not apparently to be given an opportunity of showing cause against ceasing to run the factory in its existing location. The point taken by Mr. K. S. Jayarama Aiyar in revision is that by virtue of the corresponding provisions in the Madras Public Health Act and the Madras Local Boards Act, the learned Magistrate had lost his jurisdiction to deal with nuisances of this character. In support of his argument he has relied on several passages in Maxwell's Treatise on the Interpretation of Statutes and also on the decision in *Corporation of Madras* v. *Madras Electric Tramways, Ltd.*,[1] in which the learned Judge dealt with the question of conflicts arising between general statutes and special acts in this way:

> " A good deal of time was occupied in the arguments by a discussion of the question how special Acts and general Acts, if they came into conflict, are to be treated. A great deal of that discussion, if I may say so, appeared to me unnecessary. There is the old maxim, *generalia specialibus non derogant*; that general provisions do not derogate from special provisions. If the legislature makes a special Act dealing with a particular case and later makes a general Act, which by its terms would include the subject of the special Act and is in conflict with the special Act, nevertheless unless it is clear that in making the general Act the legislature has had the special Act in its mind and has intended to abrogate it, the provisions of the general Act do not override the special Act. If the special Act is made after the general Act, the position is even simpler. Having made the general Act if the legislature afterwards makes a special Act in conflict with it, we must assume that the legislature had in mind its own general Act when it made the special Act and made the special Act, which is in conflict with the general Act, as an exception to the general Act. Those propositions appear to me to be beyond discussion at the present day."

It is on this principle that Mr. K. S. Jayarama Aiyar relies but Mr. Basheer Ahmed Sayeed, the learned Advocate for the respondent, contends that there is nothing in section 133 of the Criminal Procedure Code which is in any way in conflict with the corresponding provisions in the two local Acts. He agrees that there are similar remedies provided in these three Acts but contends that there is nothing in conflict between them, the only differences being regarding the powers which the various authorities possess under the different provisions.

Omitting unnecessary words, these are the various provisions. Under section 133 (1) of the Code:

> " Whenever . . . . . a Sub-Divisional Magistrate . . . . . considers . . . . . that the conduct of any trade . . . . . is injurious to the health or physical comfort of the community and that in consequence such trade or occupation should be prohibited or regulated . . . . such Magistrate may make a conditional order requiring the person . . . . carrying on such trade . . . . to desist from carrying on or to remove . . . . such trade . . . . or, if he objects so to do, to appear before himself . . . . . and move to have the order set aside or modified . . . . ."

The corresponding provision in section 195 (1) of the Madras Local Boards Act is in these words:

1. (1930) 60 M.L.J. 551 : I.L.R. 54 Mad. 364.

"If in any factory . . . . in which steam power, water power or other mechanical power or electrical power is used, nuisance is caused by reason of the particular kind of fuel employed or by reason of the noise or vibration created, the panchayat may issue such directions as it thinks fit for the abatement of the nuisance within a reasonable time to be specified for the purpose.

(2) If there has been wilful default in carrying out such directions or if abatement is found impracticable, the panchayat may prohibit the use of the particular kind of fuel employed or restrict the noise or vibration by prohibiting the working of the factory, work shop or work place between the hours of 9-30 P.M. and 5-30 A.M."

Under section 43 of the Madras Public Health Act,

"any person aggrieved by a nuisance in any local area may give information of the same to the Health Officer or any other officer of the public health establishment of the local authority."

Under section 44,

"if the Health Officer is satisfied . . . . he may by notice require the person by whose act, default or sufferance the nuisance arises or continues . . . . . to abate the nuisance and to execute such works and take such steps as may be necessary for that purpose."

It is clear from a comparison of these several provisions that there is nothing in conflict between them, and, as pointed out by Mr. Basheer Ahmed Sayeed, the only differences between them are in the remedies provided. For instance, under section 133 of the Code a Magistrate has jurisdiction to stop a factory working or to direct its removal, but under section 195 of the Madras Local Boards Act, the powers of the Panchayat Board are limited to abating nuisances of smoke or noise. The learned Public Prosecutor, who opposes the petition, has cited the case of *Lalman* v. *Bishambarnath*[1]. That was a case in which a Magistrate had taken action under section 133 of the Code to abate a nuisance caused by the working of a lime kiln and in view of the corresponding provision in the Local Municipalities Act, the right of the Magistrate to take action under section 133 of the Code was challenged. The contention was overruled and the learned Judge held that there was jurisdiction in the Magistrate to act under section 133 of the Criminal Procedure Code although the order was set aside on other grounds. A further point taken by the learned Public Prosecutor is that as the Criminal Procedure Code is an Act of the Indian Legislature its provisions cannot be in any way affected by a local Act. For these reasons, I agree that the learned Magistrate had jurisdiction to proceed under section 133 of the Code. Whether or not the remedy proposed for the abatement of the nuisance is within his powers or suitable to the facts of the case is a matter which is beyond the scope of the present petition. The petition is accordingly dismissed.

There is also a petition for the transfer of this case from the file of the Joint Magistrate for the reasons set out in the affidavit but in view of what has happened no further proceedings are likely. I am informed that the licence granted to the factory by the local Board has subsequently been cancelled, so that the question of abating the nuisance caused by its working will no longer arise, other remedies being applicable should the petitioner continue the working of the factory without a licence. I am also informed that the Government have issued proceedings under which the local Panchayat Board will declare the area to be a residential area within the meaning of section 89 of the Madras Public Health Act. The effect of this will be that under section 92 (*b*) of the Act appropriate restrictions will be placed on the working of the factory so as to prevent any nuisance. The petition for transfer is therefore dismissed.

K.S. *Petitions dismissed.*

[PRIVY COUNCIL.]

PRESENT :—LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, LORD ROMER, SIR GEORGE RANKIN AND SIR MADHAVAN NAIR.

Pr. N. Sm. Chockalingam Chettiar .. *Appellant**

v.

The Official Assignee of Madras .. *Respondent.*

Presidency Towns Insolvency Act (III of 1909), section 49 (5)—Insolvency of Hindu son—No priority in regard to joint family property for creditor of the insolvent's father against the creditors of the son—Priority exists in respect of father's separate property.

1. (1931) I.L.R. 54 All. 359.

*P. C. A. No. 30 of 1941. 13th October, 1942.

On the insolvency of the sons of a deceased Hindu father, the father's creditor who was allowed by a compromise binding on the Official Assignee to prove for the debt in the insolvency claimed priority.

Held: The Hindu law as administered to-day has departed from the old Hindu law, the tendency being to restrict and not to extend the limits of its doctrine. This tendency cannot be departed from by holding that a priority of payment out of the joint property exists to-day in favour of the creditors of a father against the creditors of a son.

But even if such a priority had existed under the Hindu law, it must yield to any statutory provision inconsistent therewith; and the Presidency Towns Insolvency Act, section 49 (5) provides that "subject to the provisions of this Act all debts proved in insolvency shall be paid rateably according to the amount of such debts respectively and without any preference." Nowhere in the Act is any priority conferred on the debts of an insolvent's father.

As regards, however, the separate property of the father, before it can be applied in favour of the sons' creditors in the insolvency proceedings, all creditors of the father must first have had their claims satisfied thereout and this may well necessitate some proceedings in the nature of a suit for administration.

On appeal from the judgment of the High Court of Judicature at Madras (*Pandrang Row* and *Venkataramana Rao, JJ.*) in O. S. Appeal No. 68 of 1937 and reported in (1940) 2 M.L.J. 621.

Sir Herbert Cunliffe, K.C., and *Subba Rao* for Appellant.

Pringle for Respondent.

Their Lordships' Judgment was delivered by

LORD RUSSELL OF KILLOWEN.—This is an appeal from a decision of the High Court of Madras (in its appellate jurisdiction), which varied an order made by the same Court (in its insolvency jurisdiction), which had reversed an order made by the Official Assignee of Madras. It will be convenient in the first place to state shortly the events which led up to this appeal.

In 1919, there existed an undivided Hindu family, consisting of the father A. R. Somasundaram and his four sons Arunachalam, Ramanathan, Sundaresan and Lakshmanan, which carried on business in divers places in British India, and at Jaffna and Colombo in Ceylon. In 1919, Ramanathan died and in 1923 the father died. On the 14th May, 1925, letters of administration were granted by the District Court of Jaffna to Arunachalam and Sundaresan on the footing that their father had died intestate; but subsequently the Secretary of the Court was associated in the administration as official administrator, and was virtually in charge of the administration.

By an order of the High Court at Madras, dated the 15th July, 1925, it was ordered that Arunachalam and Sundaresan be adjudged insolvents, and that their properties, wherever situate, do vest in the Official Assignee of that Court. By an order of the High Court dated the 6th August, 1928, and made in those insolvency proceedings, it was ordered that sanction be accorded to an agreement by way of compromise, and that the entire interest of the insolvents' firm, including the interest of Lakshmanan and the two sons then living of the insolvent Arunachalam, in the properties of the insolvents' firm situate within and outside British India, movable and immovable, do vest in the Official Assignee.

At some time in or about the year 1928 it was discovered that A. R. Somasundaram had left two Wills, by one of which (dated the 2nd October, 1922) he disposed of his own separate property consisting of businesses carried on at Rangoon and Jaffna: by the other (dated the 23rd October, 1922) he purported to dispose of the property of the joint family. As a result a grant of letters of administration with the said Wills annexed was made by the High Court at Madras to the Official Assignee. A similar grant was made by the District Court of Jaffna to Messrs. Harding and Thornton of Colombo who were the duly constituted attorneys of the Official Assignee.

Meanwhile a suit had been instituted on the 19th January, 1926, in the District Court of Colombo (No. 18800) by one Panya Reena Ravenna Sovanna Mana Somasundaram (hereinafter for brevity referred to as Panya) against the Secretary of the Court of Jaffna, the official administrator of the father of the insolvents, praying for judgment against the defendant as official administrator for a sum of

Rs. 1,61,127, being the amount alleged to be due to the plaintiff in respect of moneys advanced to the said father and interest thereon. Panya died in March, 1929, and subsequently his son, the appellant was substituted as plaintiff and Messrs. Harding and Thornton were substituted as defendants in the Colombo Suit No. 18800. Judgment was delivered in that suit on the 12th January, 1933, and resulted in a decree of that date, by which it was ordered that Messrs. Harding and Thornton as administrators of A. R. Somasundaram do pay to the appellant as administrator of the estate of Panya " the sum of Rs. 1,61,127/22 with interest thereon at the rate of 9 per centum per annum from the 20th January, 1926, till payment in full and costs of suit." Following on this judgment the appellant seems to have attached a fund in the Jaffna Court.

From this judgment, an appeal was lodged, on which on the 17th November, 1933, an order was made in the following terms :

" Of consent it is considered and adjudged that the decree made in this action by the District Court of Colombo and dated the 12th January, 1933, be and the same is hereby affirmed and this appeal is dismissed subject to the terms of settlement arrived at between the parties and filed herewith. And it is further ordered and decreed that each party do bear his costs of this appeal."

The terms of settlement referred to run thus :—

" Substituted plaintiff is to be paid his taxed costs incurred in 18,800 D. C. Colombo, such costs not to exceed Rs. 9,000. He agrees to share *pro rata* with all the other creditors the assets of the deceased. He is entitled to proceed for the recovery of any balance that may be due to him in action No. 18,800 D. C. Colombo from assets that may exist out of Ceylon. The Official Administrator undertakes to withdraw his appeal in 18,800 D. C. Colombo."

In accordance with these terms (which will be referred to as the compromise) the appellant received out of the Ceylon assets of A. R. Somasundaram, as his share *pro rata* with the other creditors of that person, a sum of Rs. 47,573, leaving a balance of Rs. 1,13,554 unpaid of the said judgment debt of Rs. 1,61,127.

The appellant then lodged a claim in the insolvency proceedings in Madras. From the wording of his affidavit in support he would appear to be claiming to be paid the full amount of the judgment debt and interest out of the joint family property in priority to the creditors of the insolvents ; but in fact his claim is limited (as of necessity it should be) to the unpaid balance. His claim was rejected *in toto* by the Official Assignee. The appellant thereupon applied to the Judge of the High Court sitting in insolvency asking that the order of the Official Assignee rejecting his claim be rescinded and that his claim be admitted, for the following reasons (among others), *viz.*, (III) because the claim was to make the joint family assets in the hands of the Official Assignee liable for the debts due by the father of the insolvents and (IX) because the Official Assignee was estopped by the compromise from repudiating or rejecting the claim.

On the 23rd August, 1937, Wadsworth, J., made an order on that application allowing the appeal and declaring and ordering as follows :—

" 1. That the claim of the applicant herein for the sum of Rupees One lakh sixty-one thousand one hundred and twenty-seven (Rs. 1,61,127) with interest thereon excluding the sum of rupees forty-seven thousand five hundred and seventy-three (Rs. 47,573) received under the compromise dated the 21st October, 1933, due under the decree in suit No. 18,800 of 1926 on the file of the District Court, Colombo, be and is hereby allowed ;

2. that the applicant shall be at liberty to prove the balance of his debt due under the said decree before the said Official Assignee subject to the limit that it shall not exceed the assets of the joint family and the assets of Somasundaram Chettiar, deceased, the father of the applicant herein, which have come into the hands of the sons ;

3. that the applicant shall not be entitled to any priority over the separate estate of Somasundaram Chettiar, deceased, which has come down to the sons."

Against that order the present appellant appealed in so far as it declined to give him priority ; and the Official Assignee appealed against it in so far as it allowed him to prove in the insolvency proceedings at all. The appeals were heard by the High Court in August, 1939. Judgment was reserved and was delivered on the 16th October, 1939. The appeal of the present appellant was dismissed, and the appeal of the Official Assignee was in part allowed, *i.e.*, the order of Wadsworth J., was modified to the following extent :—

" Order and decree that the claimant . . . . . . shall be entitled to prove in the above insolvency for the balance of the debt due to him after giving credit for the amount realised by him

in the Jaffna administration . . . . . and that the said claimant shall not be entitled to interest in respect of the said debt due to him from the date of the adjudication of the insolvents . . . . and that save as aforesaid the said order of the High Court dated the 23rd August, 1937 . . . . . be and is hereby confirmed in other respects."

Each appellant was ordered to pay the costs of the respondent to his appeal.

The present appellant obtained leave in Madras to appeal to His Majesty in Council in regard to the variation as to interest. He was refused leave to appeal from the dismissal of his own appeal, but he subsequently obtained special leave from His Majesty in Council. It is in these circumstances that the order of the High Court of the 16th October, 1939, has come up in its entirety for consideration before their Lordships' Board. The Official Assignee has not appealed.

The resultant effect of the variation of the order of the 23rd August, 1937, and its confirmation in other respects by the High Court, is that the order of Wadsworth, J., stands *verbatim* as before set forth with the single exception that the words "with interest thereon" are omitted from the first paragraph. Whether an order so framed is to any and what extent wrong, is the question which their Lordships now proceed to consider.

A few preliminary observations are advisable. It had been contended by the Official Assignee that he was in no way affected or bound by the compromise; but both Courts in India held that it was binding on him. With this view their Lordships agree; indeed the contrary contention was not raised before them. In the next place it is to be observed that owing to lack of clear and definite information, there has arisen in this case much uncertainty and confusion as to what property is being administered by the Official Assignee in the insolvency and in particular whether it includes any property which was the separate property of the father of the insolvents. Some complication no doubt springs from the fact that during the two years which intervened between the death of A. R. Somasundaram and the adjudication of insolvency, the two insolvents had (acting on the footing of intestacy) carried on businesses which were the separate property of their father, a proceeding which may well have resulted in making them creditors of their father's estate. Further the Official Assignee may, as administrator of the father, have obtained possession or control of his separate property. However this may be, it seems clear to their Lordships that before any of the father's separate property can be applied in payment of any of the son's creditors in the insolvency proceedings, all creditors of the father must first have had their claims satisfied thereout. All that can vest in the Official Assignee under section 17 of the Presidency Towns Insolvency Act is the property of the insolvents, and therefore as regards the separate property of the father, all that can properly be dealt with in the insolvency proceedings for the benefit of the creditors of the insolvents, is the interest of the insolvents which will remain after the father's debts have been ascertained and paid. This may well necessitate some proceedings in the nature of a suit for administration. Their Lordships were, however, given to understand that the only separate estate of the father (beyond the Ceylon assets which have been distributed as contemplated by the compromise) consists of the business carried on by him at Rangoon. Of its value they know nothing. It will, however, be open to the present appellant to take such administration or other proceedings (if any) as he may be advised, to secure that any separate estate of the father which exists is properly administered by the administrator before any part thereof is made available in the insolvency proceedings for payment of the creditors of the insolvents.

The doubts and difficulties which their Lordships have felt as to the property which is being administered in the insolvency proceedings, have been to a great extent cleared by what the Judges have indicated in the High Court on appeal. They say that by the agreement sanctioned by the order of the 6th August, 1928,

"all the property possessed by the joint family became vested in the Official Assignee";

and later on in their judgment they state:

"The separate property in British India left by the father was the business in Rangoon and its assets. The rest of the properties were owned by the father and sons as joint family property."

It thus becomes apparent that the only property with which this appeal can be concerned is the joint family property which on the death of the father devolved

by survivorship. It is out of this property, the entirety of which has (with the Court's approval) been vested in the Official Assignee, and is being administered in the insolvency proceedings, that the appellant claims to be paid his debt in priority to the creditors of the insolvents. He bases this claim (1) upon a right to priority which he says is conferred upon him by the compromise, and (2) upon a right alleged to be conferred upon him by the Hindu law, which makes sons (to the extent of their interest in joint family property) liable to pay their father's debts, provided they are not debts incurred for an illegal or immoral purpose. This claim to priority which is the first and most important question raised on this appeal, must now be dealt with.

The contention that any priority is conferred by the compromise appears to their Lordships to be without foundation. The compromise merely provides that the taking by the appellant of a dividend on his judgment-debt out of the Ceylon assets, shall be no bar or prejudice to his proceeding to recover the balance from assets outside Ceylon. Their Lordships are unable to find in the compromise any words which purport to confer any priority in recovery. It was said that under the compromise he was to be entitled to recover the balance, and that such a right necessarily postulated priority. But the compromise gives him no such right ; it merely ensures to him the right to proceed to recover, *i.e.*, to take proceedings to recover. As already stated, it ensures to him that his taking a dividend in Ceylon shall not prejudice or bar his proceeding against assets elsewhere.

His claim to priority under Hindu law is founded mainly, if not entirely, on a text of *Brihaspati* referred to in Mayne's Hindu Law (S. 313) in the following words :—

"The father's debt must first be paid and next a debt contracted by the man himself."

No other authority in relation to Hindu law was cited in support of the proposition. Although the question must frequently have arisen as a matter of great practical importance, it is strange that, if it existed, no case is found in the books establishing such priority. As was pointed out by Abdur Rahman, J., in *Thumbalam Gooty Thimmiah* v. *The Official Receiver*[1], if a father's debts have priority, a son's creditor could not obtain payment out of the son's undefined share in the family property. He would have to wait until all the father's creditors had been paid ; in other words a son's creditor would be driven to enforce his claim in some kind of administration suit in which the father's creditors would have to be ascertained and their debts paid. The case referred to above is to some extent an authority against the appellant's claim to priority under the Hindu law, but in fact the learned Judge rejected the claim to priority in that case by reason of the statutory provisions of the Provincial Insolvency Act.

There is no trace of any such priority being recognised by the provisions of the Indian Succession Act which in terms assign specific priorities to the debts of a dead man (*see* sections 320-322), although no doubt the concluding words of section 322 would preserve any priority which in law existed. Section 323 however indicated a *prima facie* condition of equality by enacting that " save as aforesaid, no creditor shall have right of priority over another." Reference may also be usefully made in the same connection to the Civil Procedure Code, Order 20, rule 13 (2), in the case where the deceased's estate is insolvent.

There can be no doubt that, in many respects, the Hindu law as administered to-day has departed from the old Hindu law, the tendency being to restrict and not to extend the limits of its doctrine. Thus while under the old Hindu law the liability for a father's debt extended to the personal property of the son, it is now limited to his interest in the joint family property. Again while under the old Hindu law the liability of sons and grandsons *as heirs*, for the debts of their deceased father or grandfather, extended to their own property, this rule was only followed, in British India, in the Bombay Presidency. Elsewhere the liability of sons and grandsons *as heirs* was limited (as in the case of other heirs under Hindu law) to the extent

1, (1939) 1 M.L.J. 158.

of the property inherited by them from the deceased ; and by the Bombay Hindu Heirs Relief Act, 1866, the liability of sons and grandsons as heirs in that Presidency was placed upon the same footing.

Their Lordships are not prepared to depart from this tendency by holding that a priority of payment out of the joint property, which so far as they are aware has never prevailed in practice among the Hindus in British India, exists to-day in favour of the creditors of a father as against the creditors of a son.

But even if such a priority had existed under the Hindu law, it would have had to yield to any statutory provision inconsistent therewith ; and in the present case the provisions of the Presidency Towns Insolvency Act afford a complete answer to the appellant's claim. He is proceeding to recover the balance of his judgment debt by proving in the insolvency proceedings ; he is therefore subject to the provisions of the Act, unless the compromise to any extent excludes them, and their Lordships have already stated that the compromise confers no priority. The appellant is therefore subject to section 49 of the Act which after providing for certain priorities in the payment of debts enacts (by sub-section 5) that

" Subject to the provisions of this Act, all debts proved in insolvency shall be paid rateably according to the amounts of such debts respectively and without any preference."

Nowhere in the Act is any priority conferred on the debts of an insolvent's father, and by sub-section (5) the appellant is bound.

The second claim put forward by the appellant was that the High Court had erred in striking out the reference to interest from the order of Wadsworth, J., and that he was entitled to prove for a sum amounting to the said sum of Rs. 1,13,554 together with interest at 9 per cent. thereon down to the lodgment of his claim with the Official Assignee. On the respondent's behalf it was contended that no interest on the principal sum could be claimed because of rule 23 in the second schedule to the Act which provides :—

" 23. (1) Interest.—On any debt or sum certain whereon interest is not reserved or agreed for, and which is overdue when the debtor is adjudged an insolvent and which is provable under this Act, the creditor may prove for interest at a rate not exceeding six per centum per annum—

(a) if the debt or sum is payable by virtue of a written instrument at a certain time, from the time when such debt or sum was payable to the date of such adjudication ; or

(b) if the debt or sum is payable otherwise, from the time when a demand in writing has been made giving the debtor notice that interest will be claimed from the date of the demand until the time of payment to the date of such adjudication.

(2) Where a debt which has been proved in insolvency includes interest or any pecuniary consideration in lieu of interest, the interest or consideration shall, for the purposes of dividend, be calculated at a rate not exceeding six per centum per annum without prejudice to the right of a creditor to receive out of the debtor's estate any higher rate of interest to which he may be entitled after all the debts proved have been paid in full."

This rule does not appear to their Lordships to apply to this case in which the date of adjudication is antecedent to the judgment debt, and in which by the decree express provision is made for the debt to carry interest. Moreover the compromise authorises a proof by the appellant for " any balance that may be due to him in action No. 18,800," words which would appear to include the interest given by the judgment. On other grounds however there is a difficulty in the way of the appellant. His counsel in the High Court at Madras on the hearing of the appeal conceded that if the provisions of the Insolvency Act were to be applied his client would not be entitled to this interest ; but he argued that under the compromise his client was entitled to ' get ' the balance of the amount due under the decree of the Colombo Court, and that the Official Assignee had therefore agreed that he should get interest on the decreed amount. This contention their Lordships have already said to be unfounded. The compromise gives the appellant no right to "get" or recover any sum. It only ensures to him the right to take proceedings against assets outside Ceylon. In the result the High Court, after rejecting the suggested construction of the compromise, relied upon the concession by counsel and rejected the claim to prove for interest on the sum of Rs. 1,13,554. Their Lordships think that in view of these facts the disallowance of this interest must stand.

One further point remains for consideration. Counsel for Official Assignee claimed that the Official Assignee was entitled to dissect the claim for Rs. 1,13,554

by ascertaining how much of the original judgment debt of Rs. 1,61,127 represented interest on the father's debt and that the proof could only be admitted subject to the provisions of rule 23; with the result that the proof could be rejected to the extent to which it was composed of interest subsequent to the date of the adjudication. With this contention their Lordships do not agree. One thing which they think the compromise clearly does is to prevent any one bound by the compromise from going behind, or in any way disputing, the judgment-debt. Another is that it fixes the amount, which the appellant is to be entitled "to proceed to recover," as the balance due under the judgment, *viz.* (in the events which have happened), Rs. 1,13,554. It would not be right if in the face of that agreement the proof was only admitted for the smaller sum. A further answer to this contention lies in the fact that the order of the High Court on appeal fixes the proof at Rs. 1,13,554, and against that order there has been no appeal by the Official Assignee. Moreover while no doubt the provisions of rule 23 (2) are applicable to the case where a creditor proves for a debt and in addition for interest added thereto as provided by rule 23 (1), their Lordships are of opinion that they do not apply to the present case of a judgment debt obtained against the representative of the father, which by a special agreement of compromise by which the Official Assignee is bound, the parties are precluded from going behind or disputing in any way.

The ultimate result of this appeal may now be stated as follows :—There being no question but that the father's separate property must be administered in such a way that all the father's creditors are paid thereout before any interest of the insolvents therein can be made available in the insolvency proceedings for the benefit of the creditors of the insolvents, the question of the priority in respect of the father's separate property does not arise in the insolvency proceedings at all. The order of the 23rd August, 1937, as varied by the order of the 16th October, 1937, requires to be recast and should run as follows :—

" 1. That the claim of the applicant herein for the sum of rupees one lakh sixty-one thousand one hundred and twenty-seven (Rs. 1,61,127) excluding the sum of rupees forty-seven thousand five hundred and seventy-three (Rs. 47,573) received under the compromise dated the 21st October, 1933, due under the decree in Suit No. 18,800 of 1926 on the file of the District Court, Colombo, be and is hereby allowed.

2. That the applicant shall be at liberty to prove the said balance of his debt due under the said decree before the said Official Assignee subject to the limit that it shall not exceed the assets of the joint family.

3. That the applicant shall not be entitled to any priority over the said assets of the joint family."

The provisions of paragraph 4 of the said order will remain unaltered.

The appellant, although their Lordships have indicated the manner in which he may (if so advised) proceed in order to obtain payment (together with other creditors of the father) out of the father's separate property, if it be of any value, has nevertheless failed in establishing the main part of his claim, *viz.*, for priority in payment out of the joint family estate. He has, however, established that the debts of the father should be paid before the separate estate of the father is applied to any extent in paying creditors of the insolvents, and that his proof in the insolvency should stand at Rs. 1,13,554.

For the reasons herein appearing their Lordships are of opinion that the order appealed from should be varied as indicated, and they will humbly advise His Majesty accordingly.

There will be no order as to the costs of this appeal ; but the costs of the Official Assignee will form part of his expenses of administering the estates of the insolvents.

Solicitors for Appellant : *H. S. L. Polak.*

Solicitors for Respondent : *Lambert* and *White.*

K.S. *Decree modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Rangaswami Nayudu and others .. *Petitioners** (*Counter-petitioners*).

Criminal Procedure Code (V of 1898), section 107—Security proceedings—Trial for past offences—Concurrent proceeding—Evidence same in both—Whether admissible in spite of the two proceedings being entirely different in scope.

There is no illegality in admitting evidence in security proceedings, under section 107, Criminal Procedure Code, of a specific charge which is the subject of a current trial punishable under the Indian Penal Code. The scope of the proceedings is entirely different, one being concerned with offences committed in the past and the other being concerned with the likelihood of a breach of peace in the future. If the same evidence is relevant to both proceedings there is no reason why the same evidence should not be used in both.

Lachman v. *Emperor*, (1927) 28 Cr.L.J. 515 and *Budhan* v. *Emperor*, (1925) 88 I.C. 362, followed.

Petition under sections 435 and 439 of the Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of the Sub-Divisional Magistrate of Pollachi, dated 9th March, 1942, and passed in M. C. No. 71 of 1941.

N. S. Mani for Petitioners.

K. Venkataraghavachari for the Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—Proceedings have been instituted against the petitioners under section 107, Criminal Procedure Code. This Court has been asked to quash the proceedings because it has been held by this Court that breaches of the peace in the past do not justify an order under section 107. In the alternative, I am asked to order that evidence of specific offences which are the subject of separate trials should not be admitted in the security proceedings.

Although it is true that section 107, Criminal Procedure Code, gives authority to a Court to call upon persons to furnish security only if it is likely that a breach of the peace will occur in the future, yet I have no reason to believe that the Magistrate will pass an order against the petitioners unless he is satisfied that breaches of the peace will occur in the future as they have occurred in the past. I am not prepared to anticipate what the learned Magistrate is going to say or do in these proceedings.

On the second point, I am satisfied that there is no illegality in admitting evidence in the security proceedings of a specific charge which is the subject of a current trial. The scope of the proceedings is entirely different, one being concerned with offences committed in the past and the other being concerned with the likelihood of a breach of the peace in the future. If the same evidence is relevant to both proceedings, I can see no reason why the same evidence should not be used in both those proceedings. The decisions reported in *Lachman* v. *Emperor*[1] and *Budhan* v. *Emperor*[2] of the Allahabad High Court are to the effect that evidence of the same matters can be used in the two classes of proceedings.

It is true that if security proceedings go on at the same time as the regular trial for offences punishable under the Indian Penal Code, hardships may be caused to the accused, and it may be very difficult for them to conduct two defences at the same time. I have no reason however to believe that this problem is beyond the ability of the local Magistrates to cope with. I have no doubt that they will do their best to make it possible for the accused to conduct their defences without undue difficulty.

The petition is dismissed.

K.C. ——— *Petition dismissed.*

---

*Crl. R. C. No. 275 of 1942. (Crl. R. P. No. 261 of 1942). 30th July, 1942.

1. (1927) 28 Cr. L. J. 515.
2. (1925) 88 I. C. 362.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

M. Murtuzali Sahib .. *Petitioner** (*Accused*).

Madras District Municipalities Act (V of 1920), section 338—Licence subject to certain conditions—Non-compliance—Prosecution—Absence of notice to licencee—Effect of.

Where the petitioner was in possession of an old cart-stand and he applied for a renewal of his licence to the Municipality and was granted the licence subject to certain conditions, on a prosecution for his non-compliance with those conditions,

Held, that the offence was one punishable under section 338 of the District Municipalities Act, and as under the section the petitioner was entitled to notice before prosecution, he could not be convicted in the absence of such a notice.

Petition under sections 435 and 439 of the Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the City First Class Magistrate, Madura, dated 20th November, 1941 and passed in Crl. Ap. No. 81 of 1941, preferred against the judgment of the Court of the Sub-Magistrate, Madura Town, dated 26th September, 1941, and passed in C. C. No. 678 of 1941.

C. K. Venkatanarasimham for Petitioner.

A. S. Sivakaminathan for the Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—The petitioner has long been in possession of an old cart-stand which contained none of the modern hygienic devices for rendering it sanitary. On 20th March, 1940, he applied to the executive authority of the Municipality of Madura to renew his licence for the year 1940-41. No orders were passed on his application until 4th December, 1940, when he was granted a licence subject to certain conditions. This licence with conditions imposed reached him on 18th January, 1941. He did not comply with these conditions, and so prosecution was launched on 19th March, 1941. The Stationary Second Class Magistrate considered that he was guilty of a failure to observe the terms of the licence and was therefore punishable under section 338 of the District Municipalities Act. In appeal, it was urged on behalf of the petitioner that no notice was given to him as is required under section 338, and that therefore he could not be punished. The City First Class Magistrate held that section 338 did not apply ; for he had failed to comply with the requirements of section 270-E, which relates to the issuing of a licence by the Municipality and that therefore he was guilty under section 313 of contravening a provision of the sections specified in the first column of Schedule VII. He therefore changed the conviction to one under section 313 and maintained the fine.

Section 270-E does not impose any duty on private persons, except that it says that no person shall open a new private cart-stand or continue to keep open such a stand unless licenced to do so. In clause (2) the method of making the application is set out. Sub-section (3) imposes an obligation, not on the owner of a cart-stand but upon the Council, to issue a licence in the case of an old cart-stand such as we are here considering. The petitioner did take out a licence ; but he failed to comply with the terms thereof. In failing to do so, he did not contravene any of the provisions of section 270-E. I do not think that it can be said that the licence was a conditional one in the sense that unless and until the conditions were complied with no licence existed. If that were the interpretation of clause (3), then it would not be easy to understand the other provisions of the Act which make punishable the contravention of conditions of a licence.

It follows that the learned trial Magistrate was right in holding that the offence was one punishable under section 338 of the Act. As no notice was given to the petitioner as required under section 338, he could not be convicted. It may be added that the delay of the local authority in issuing the licence seems inexcusable.

The petition is therefore allowed, the conviction set aside, and the fine ordered to be refunded.

K.C. ——— *Petition allowed.*

*Crl. R. C. No. 179 of 1942.
(Crl. R. P. No. 166 of 1942). 2nd July, 1942.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Pedda Kambi Reddy and others .. *Petitioners* (Accused).*

Criminal Procedure Code (V of 1898), section 349—Sub-Magistrate finding that accused ought to be dealt with in a manner beyond his own powers referring case to Joint Magistrate—Procedure to be followed by Joint Magistrate.

A Sub-Magistrate, being of opinion that the accused ought to be dealt with in a manner beyond his own powers, acted under section 349 of the Code of Criminal Procedure and referred the case to the Joint Magistrate having jurisdiction. On the question of the procedure to be followed by the Joint Magistrate,

Held, that the case, after the reference to him, was a continuation of the original trial, that the accused had the same rights as they had before the reference, and that the Joint Magistrate was under the same obligation to hear arguments from the pleaders present and to write a judgment giving his reasons for his order as in an ordinary calendar case tried entirely by him. Accordingly, a judgment prefixing the order with the words " the facts of the case are stated below in the words of the Sub-Magistrate," then embodying the Sub-Magistrate's order verbatim and adding at the end the words : " I am of opinion that a bond for keeping the peace should be taken from them. I order all the accused under section 106 (1), Criminal Procedure Code, to execute a bond "—is not a proper judgment.

Petition under sections 435 and 439 of the Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the Joint Magistrate, Madanapalle, in M. C. No. 96 of 1941 in pursuance of the proceedings submitted by the Court of the Stationary Sub-Magistrate, Piler, in C. C. No. 853 of 1941.

A. Bhujanga Rao for Petitioners.

A. S. Sivakaminathan for the Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—The Sub-Magistrate of Piler, being of opinion that the accused ought to be dealt with in a manner beyond his own powers, acted under section 349, Criminal Procedure Code and referred the case to the Joint Magistrate of Madanapalle. The Joint Magistrate duly convicted and sentenced all of the accused and also passed an order under section 106 of the Criminal Procedure Code.

It is not quite clear from the record that the accused were present when the Joint Magistrate disposed of the reference, but we may assume that the Joint Magistrate did what was obviously required of him. We find that a letter was sent to the Sub-Magistrate of Piler ordering him to bind over the accused before him on the 17th December, 1941, but there are no bonds in the record to suggest that they were bound over. However that may be, the Joint Magistrate certainly did not dispose of the case in a satisfactory manner. The case, after the reference to him, was a continuation of the original trial; and the accused had the same rights as they had before the reference. The Joint Magistrate was under the same obligation to hear arguments from the pleaders present and to write a judgment giving his reasons for his order as in an ordinary calendar case tried entirely by him. Instead of writing his own judgment, the Joint Magistrate embodied the order of the Sub-Magistrate, prefixing the order with the words, " The facts of the case are stated below in the words of the Sub-Magistrate." After the Sub-Magistrate's order had been set out verbatim the Joint Magistrate added, " I convict all the accused and sentence every one of them except A-5 to a fine of Rs. 25 . . . . . : I am of opinion that a bond for keeping the peace should be taken from them. I order all the accused under section 106 (1), Criminal Procedure Code, to execute a bond . . . . ." This is not a proper judgment.

The petition is therefore allowed, the conviction and sentences and the order under section 106 (1) are set aside, and the case is remanded to the Joint Magistrate for disposal according to law. If the accused are represented by a pleader he should hear that pleader ; if they are not, he should ask them if they wished to say anything before he pronounces judgment.

K.S. —— *Petition allowed.*

*Crl. R. C. No. 266 of 1942. (Crl. R. P. No. 252 of 1942). 24th July, 1942.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUPPUSWAMI AYYAR.

Kuppuswami Goundan .. *Petitioner**

v.

Mari Goundan *alias* Mariappa Goundan and others .. *Respondents.*

Practice—Jurisdiction—Suit valuation—Suit for partition of family properties and possession of share ignoring a partition effected during plaintiff's minority as null and void—Value for cancellation of prior partition deed—If to be included.

In 1922, a Hindu father became divided from his sons and left the family. The eldest son managed the affairs of the joint family and in 1938 a partition was effected between the sons one of whom, the plaintiff, who was a minor then was represented by his father. The minor son after attaining majority filed a suit for partition of the family properties and possession to him of his one-third share ignoring the partition of 1938 as null and void on the ground that the eldest son was allotted very much more than what he was entitled to. On the question whether the suit should be valued as one for the cancellation of the partition of 1938, in which case, the valuation of the suit would be much more than the pecuniary jurisdiction of the Munsiff in whose Court the suit was brought,

Held, that it was not necessary for the plaintiff to sue for setting aside the partition of 1938 and accordingly the suit could be valued as one for partition as if there was no previous division.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the District Munsiff of Dharapuram dated 29th November, 1941 and made in O. S. No. 146 of 1940.

T. R. Srinivasan for Petitioner.

T. L. Venkatarama Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—The only question for consideration is whether the suit (O.S. No. 146 of 1940) on the file of the District Munsiff's Court of Dharapuram is not cognizable by that Court by reason of the fact that the value of the suit exceeded the pecuniary jurisdiction of that Court. It was a suit for partition filed by the plaintiff against his two brothers. The plaintiff, first defendant and the second defendant are the sons of the third defendant. In 1922, the father became divided from the sons and he left the family. The first defendant (the eldest brother), managed the affairs of the joint family and in 1938 a partition was effected between the plaintiff, the first defendant and the second defendant. The plaintiff who was a minor then was represented by his father. The plaintiff filed this suit for partition of the family properties and possession to him of his one-third share ignoring the partition of 1938 as null and void on the ground that the first defendant was allotted very much more than what he was entitled to. The plaintiff valued the suit at Rs. 505-3-4 and on objection raised by the Court-fee Examiner that the proper article applicable was section 7 (*v*) of the Court-Fees Act, the plaint was amended and a court-fee on Rs. 1,010-6-8 was paid. Subsequently the first defendant filed an application (I. A. No. 372 of 1941) praying that the question as regards the valuation of the suit and its maintainability in the District Munsiff's Court of Dharapuram should be decided as preliminary issues. His contention was that the suit was really one for cancellation of the partition deed of 1938 and that if it is so treated, the valuation of the suit would be much more than the pecuniary jurisdiction of the District Munsiff of Dharapuram. It is not disputed that if the suit is to be treated as one for setting aside the partition of 1938, it will be so. But it was stated that the suit was for a partition, ignoring the partition of 1938 and that it was not necessary that the plaintiff should sue for setting aside that partition and that he was entitled to ignore it and claim a partition as if there had been no such division.

The learned District Munsiff relying on the decision of the Full Bench of this Court in *Ramaswami* v. *Rangachariar*[1] held that there was no necessity for the plaintiff to seek to set aside the partition. But it is urged for the petitioner in this Court that that decision has no application to the facts of this case as in this particular case the minor was represented by a guardian and the partition deed in question so far as the plaintiff is concerned was one executed by the guardian of the minor. And

*C. R. P. No. 92 of 1942. 6th January, 1943.

1. (1940) 1 M.L.J. 32 : I.L.R. (1940) Mad. 259 (F.B.).

it is also stated that in cases where the document is executed by a father or manager of a joint Hindu family, both in the capacity as manager and father and also as guardian of the minor, it would be open to the minor on attaining majority to ignore it and proceed as if it is not binding on him. But in cases where the person who executed the document did not act in his capacity either as manager or father but only as a guardian of a minor, it will be necessary for the minor to have the document set aside before he could recover possession of the properties.

Reliance was placed upon the decisions in *Venkatakrishnayya* v. *Shaik Ali Sahib*[1], *Govindan Nair* v. *Madhavi*[2], *Alagar Iyengar* v. *Srinivasa Iyengar*[3], *Achammal* v. *Achammal*[4] and the decision in *Chandu Nair* v. *Madhavi*[5].

Even conceding that a partition is an alienation, and in this particular case the alienation was effected by a guardian of the minor in his capacity as guardian, it is stated for the respondents that it is not necessary that such an alienation should be set aside and that it is open to the minor to ignore it. For this reliance was placed upon *Kamaraju* v. *Chanduri Gunnayya*[6] and *Veeraraghavalu* v. *Sreeramulu*[7]. In both these cases it was pointed out by this Court that it is not necessary for the minor to set aside the alienation and he could ignore it. The decision in *Venkatakrishnayya* v. *Shaik Ali Sahib*[1] to the contrary is the decision of a single Judge whereas the other decisions are decisions of two Judges of this Court. The decision in *Govindan Nair* v. *Madhavi*[2] has no application to the facts of this case. There their Lordships had to consider on what basis the suit is to be valued when the express relief is one for setting aside an alienation. *Alagar Iyengar* v. *Srinivasa Iyengar*[3] was expressly dissented from in *Veeraraghavalu* v. *Sreeramulu*[7] by a Bench of this Court. In *Achammal* v. *Achammal*[4], the question for consideration was whether a suit for a declaration that a particular document was not binding on the tarwad was to be construed as a suit for setting aside that document. There the suit was filed by only some members of the tarwad and the prayer was for a declaration that it was not binding on the tarwad as a whole. Consequently it was construed as a suit for setting aside the document itself. In *Chingacham Vitil Sankaran Nair* v. *Chingacham Vitil Gopala Menon*[8], where the suit was for a declaration that the alienation in question was not binding on the plaintiffs' interest only, it was held that the suit was really one for a declaration and not for setting aside the document. *Chandu Nair* v. *Madhavi*[5] has no application to the facts of this case. There in a Malabar tarwad there was a partition and the properties of the tarwad were allotted to various branches. One of those branches alienated an item of property allotted to that branch. Then there was a suit by some other members of the original tarwad for recovery of possession of that item from the alienee. It was contended that the suit was not maintainable so long as the partition arrangement under which the particular item was allotted to a particular branch at the partition has not been set aside and that contention was upheld. So long as the members of the tarwad had not repudiated the arrangement and had not got it set aside, it would not be open to the members of one of the branches to sue for recovery of possession of the item allotted to another branch at the partition. In these circumstances, I do not think the decision in that case has any application to the facts of this case.

Even if the distinction which is sought to be made by the learned advocate for the petitioner is correct, in the face of the decision in *Kamaraju* v. *Chanduri Gunnayya*[6] it has to be held that it was not necessary for the plaintiff to sue for setting aside the partition deed of 1938.

The revision petition fails and is dismissed with costs.

K.S. ——— *Petition dismissed.*

---

1. (1938) 48 L.W. 277.
2. (1932) 62 M.L.J. 712.
3. (1925) 50 M.L.J. 406.
4. (1910) 20 M.L.J. 791.
5. A.A.O. No. 206 of 1928.
6. (1923) 45 M.L.J. 240.
7. A.I.R. 1928 Mad. 816.
8. (1906) I.L.R. 30 Mad. 18.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMAYYA.

Muhammad Yusuf Sahib .. *Appellant**

v.

The Province of Madras, represented by the Collector of Kistna at Masulipatam .. *Respondent.*

Civil Procedure Code (V of 1908), section 80—Suit against the Crown under Order 21, rule 63 to set aside order of Court dismissing plaintiff's claim—No fresh notice under section 80 necessary.

No notice to the Crown under section 80, Civil Procedure Code, prior to the filing of a suit is necessary where the suit is brought under Order 21, rule 63 to set aside an adverse order on a claim petition preferred by the plaintiff in regard to certain property attached by the Crown in execution of a decree held by it against another person, as the suit must be deemed to be a continuation of the claim proceedings.

Rajah of Ramnad v. *Subramaniam Chettiar,* (1928) I.L.R. 52 Mad. 465, applied.

Appeal against the decree of the Court of the Subordinate Judge of Bezwada in A. S. No. 73 of 1940 presented against the decree of the Court of the Principal District Munsiff of Bezwada in O. S. No. 116 of 1939.

P. Satyanarayana Rao for Appellant.

The Government Pleader (*K. Kuttikrishna Menon*) for Respondent.

The Court delivered the following

JUDGMENT.—The decision of this Court reported in *Rajah of Ramnad* v. *Subramaniam Chettiar*[1] is directly in point. There a suit was filed against a minor who was a ward of the Court of Wards. The suit was decreed against him and there were a number of appeals and the appeal in which this question arose was Appeal No. 57 of 1918. That is dealt with on pages 483 and 484 of the report. The objection raised was that no notice had been given to the ward, as provided under section 49 (1) of the Court of Wards Act and that therefore the decision of the lower Court should be reversed. Then their Lordships stated thus:

"This suit has, however, been brought under Order 21, rule 63, to set aside the order of Court dismissing the plaintiff's claim petition and it must be deemed to be a continuation of those proceedings and therefore no fresh notice to the appellant is necessary. The argument that a suit may be a continuation of the prior proceedings when the claim is allowed but is not such continuation when the claim is dismissed, is based on no recognised principle and appears to be untenable. In fact, in *Phul Kumari* v. *Ghanshyam Misra*[2], for the purpose of court-fee, a similar suit was deemed to be a continuation of the prior proceedings when the suit was brought after the claim petition had been dismissed."

Now on a reference to section 49 (1) of the Court of Wards Act it appears to me that the same decision must govern the present suit under section 80 of the Code of Civil Procedure. Section 49 (1) runs thus:

"No suit relating to the person or property of any ward shall be instituted in any Civil Court until the expiration of the two months after notice in writing has been delivered to or left at the office of the District Collector specified in the notification under section 19 or the Collector appointed under section 46, as the case may be."

Section 80 of the Code of Civil Procedure runs thus:

"No suit shall be instituted against the Crown or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been delivered to or left at the office of:

(*a*) in the case of a suit against the Central Government a Secretary to that Government ;

* * * *

(*c*) in the case of a suit against a Provincial Government, a Secretary to that Government or the Collector of the District."

So far as the point under consideration is concerned, the two Acts are similarly worded.

For the respondent, reliance was placed on the decisions of this Court in *Donepudi Subramanyam* v. *Narasimham*[3] and in *Rangaswami Goundan* v. *Errappa Gounder*[4]. In the first of these cases the question was whether in a suit by a decree-holder against

---

*S. A. No. 1172 of 1940. 16th November, 1942.

1. (1928) I.L.R. 52 Mad. 465.
2. (1907) 17 M.L.J. 618 : L.R. 35 I.A. 22; I.L.R. 35 Cal. 202 (P.C.).
3. (1928) 56 M.L.J. 489.
4. (1934) 67 M.L.J. 426.

whom an order was passed in the claim proceedings he was bound to take the leave of the Insolvency Court, the judgment-debtor having been adjudicated an insolvent, before filing the suit under Order 21, rule 63, Civil Procedure Code. The argument was that the suit was only a continuation of the claim proceedings. Wallace, J., dealt with the question and held that the suit was not a continuation of the claim proceedings and that leave of the Insolvency Court was necessary but on other points held in favour of the respondent who raised this question. Strictly the observations of Wallace, J., were *obiter.* The other learned Judge held that the leave of the Insolvency Court was not necessary on other grounds. Further, no reference is made to the decision in *Rajah of Ramnad* v. *Subramaniam Chettiar*[1]; evidently, it was not brought to their notice.

The other decision related to a suit under section 14 of the Survey and Boundaries Act; and there was no question of the suit being considered to be a continuation of a claim order.

Happell, J., before whom a question under section 14 of the Survey and Boundaries Act arose in *Province of Madras* v. *Maharajah of Jeypore*[2] pointed out the distinction between the cases of Order 21, rule 63 and section 14 of the Survey and Boundaries Act and on that ground distinguished the decision in *Rajah of Ramnad* v. *Subramaniam Chettiar*[1].

I am bound by this decision of a Bench of two Judges which is directly applicable to this case and hold that no notice was necessary.

The result is that the decrees of the lower Courts are set aside and the suit remanded for trial on the merits. The appellant is entitled to the costs in all the Courts up to date and the further costs will be provided for by the trial Court in its final judgment. Time for payment of costs—three months.

Leave refused.

K.S. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Ordinary Original Civil Jurisdiction.)

PRESENT :—MR. JUSTICE BELL.

T. S. P. L. P. Chidambaram Chettiar .. *Applicant**

v.

Jagu H. Shah and another .. *Respondents.*

Madras High Court Fees Rules, Order 4, rule 20, Order 5, rule 3—Advocate's fee—Examination of witnesses on commission—Fee separately allowable—Extra work for working out mesne profits in the action—Fee for such extra work allowable.

Where an advocate is employed to attend the examination of a witness on commission, he must be allowed whatever his proper fee is for that work separately from, and in addition to, whatever fee he may get for appearing in Court at the hearing of the case.

Order 5, rule 3 of the High Court Fees Rules is not limited in its scope.

Advocates do not and are not expected to work on the basis of results. Order 4, rule 20 of the High Court Fees Rules provides for an extra fee being allowed in respect of any matter not provided by these rules. Thus where the mesne profits in an action had to be worked out by the advocates which was really extra work,

Held, that the claim which was an excess in the *ad valorem* fee claimed in the bill of costs should be allowed as representing work which was undoubtedly performed by the advocates and for which they should be properly remunerated.

T. R. Srinivasa Iyengar and *E. A. Viswanathan* for Applicant.

V. C. Gopalaratnam as *amicus curiae*.

The Court made the following

ORDER.—This is an application for review of an order of the Taxing Officer in respect of two sums which have been disallowed in taxing a bill of costs of the defendant. The first sum of Rs. 895 was claimed as fee for an advocate instructed to examine or take part in the examination of certain witnesses on commission at Calcutta. The learned Taxing Officer took the view that such a fee was not provided

*Application No. 1824 of 1942 in C. S. No. 204 of 1938. 23rd October, 1942.

1. (1928) I.L.R. 52 Mad. 465. 2. (1943) 1 M.L.J. 53.

for in the rules and could not be allowed, in effect saying that according to the rules an advocate who was employed in a case only receives one brief fee in spite of the fact that he might, as in this case, have to go elsewhere to take part in the examination of witnesses on commission or to perform any other duty in connection with the case on the special instructions of his client. Mr. Gopalaratnam has acted as an *amicus curiae* and has pointed out very clearly and concisely that on a reading of the rules, not only of those to which the Taxing Officer's attention was drawn, such a contention cannot be upheld. The Taxing Officer's attention was invited to rule 3 of the new Order 5 of the High Court Fees Rules and also to rule 17, and he held that as rule 3 specifically refers to cases which are referred to the Official Referee or to a Commissioner for the purpose of taking accounts or other enquiry, it did not cover the taking of evidence on commission. However, if one looks at Order 23 of the Original Side Rules which provides for reference to Commissioners or Arbitrators, it will be seen that the costs of reference to a Commissioner form part of the general costs of the cause, that is to say, the costs which the one or the other party will have to pay. And further, rule 26 provides that the rules relating to a reference to a Commissioner to take accounts shall apply *mutatis mutandis*, to a reference to a Commissioner to examine witnesses or for any other purpose. In my view, that shows that Order 5, rule 3 of the Fees Rules is not limited in the way in which the Taxing Officer says. If further support were required for this view, it will be found in Order 4, rule 14 which provides for the costs of an agent being paid, where a practitioner employs an agent to act beyond the local limits of the jurisdiction of the Court. If the agent may be paid a fee, *a fortiori*, the principal must receive one if the principal acts himself. For these reasons, I think that where an advocate is employed to attend the examination of a witness on commission, he must be allowed whatever his proper fee is for that work separately from, and in addition to, whatever fee he may get for appearing in Court at the hearing of the case.

The second item related to a sum of Rs. 286-11-0 which was an excess in the *ad valorem* fee claimed in the bill. The action or the suit was valued at Rs. 46,000. The advocate's fee on that amount was allowed. Had the suit been successful, mesne profits for three years would also have been recovered, but the work in connection with this case and the mesne profits had to be done by the advocates, no matter what the result of the case was and I can see no reason why they should not be paid their fees. Advocates do not or are not expected to work on the basis of results. Order 4, rule 20 of the Fees Rules provides for an extra fee being allowed in respect of any matter not provided by these rules. If the rules do not provide for it, as the Taxing Officer seems to think, then under Order 4, rule 20, I think this extra amount should be allowed as representing work which was undoubtedly performed by the advocates and for which therefore they should be properly remunerated.

The application for review will be allowed, and I may add the thanks of this Court to Mr. Gopalaratnam. Costs of this application will be added to taxation.

K.C. ——— *Application allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Godávarti Raja .. *Appellant** (*84th J. D.-84th Deft.*)

v.

Uttaradi Matam Sri Ramachandraswami Varu represented by the trustee Sri Sri Satyadhayana Theertha Swamulavaru, since deceased and another .. *Respondents* (*Plff.-Decree-holder*).

Madras Agriculturists' Relief Act (IV of 1938), section 15—Decree for mesne profits in ejectment suit in Civil Court—Not one for rent—Interest on arrears of rent—Is part of arrears of rent to be deposited under section 15 of Act IV of 1938.

*A. A. O. No. 400 of 1940. 10th December, 1942.
(C. R. P. Nos. 2392 and 2393 of 1939 and 1641 and 1647 of 1940.)

Civil Procedure Code (V of 1908), Order 20, rule 12 (1) (c) (iii)—Mesne profits can only be decreed for three years after decree.

A decree for mesne profits passed by a Civil Court in a suit for ejectment is not a decree for rent within the meaning of section 15 of Madras Act IV of 1938 and the fact that at a date subsequent to the passing of the decree the village in which the land was situate had become an " estate " under the amended Madras Estates Land Act will not alter the character of the decree already passed.

Interest under section 61 of the Madras Estates Land Act is payable as part of the rent which is in arrears and so should be deposited where applications are made under section 15 of Madras Act IV of 1938.

Under Order 20, rule 12 (1) (*c*) (*iii*), Civil Procedure Code, mesne profits can only be decreed for three years after the date of the decree.

Ayyavaru Setti v. *Kichamma*, C.M.A. No. 321 of 1940, explained.

Appeal against the order of the Court of the Subordinate Judge of Guntur, dated 9th July, 1940, and made in E. P. No. 278 of 1939 in O. S. No. 26 of 1933, etc.

V. Govindarajachari for Appellant in A. A. O. No. 400 of 1940.

A. Gopalacharlu for Respondent in A. A. O. No. 400 of 1940 and Petitioner in C. R. P. Nos. 2392 and 2393 of 1939 and C. R. P. Nos. 1641 and 1647 of 1940.

K. Krishnamurthi for Respondent in C. R. P. No. 2392 of 1939.

K. Kottayya for Respondent in C. R. P. No. 2393 of 1939.

The Judgment of the Court was delivered by

Wadsworth, J.—(C. R. P. Nos. 2392 of 1939 and 1647 of 1940). These two civil revision petitions arise out of applications under section 15 of Madras Act IV of 1938 with reference to the same land. The amount due on this land is due under a decree for mesne profits. It seems to us quite clear that a decree for mesne profits passed by a Civil Court in a suit for ejectment is not a decree for rent within the meaning of section 15 of Madras Act IV of 1938 ; and the fact that at a date subsequent to the passing of this decree the village in which this land is situate has become an ' estate ' under the amended Madras Estates Land Act will not alter the character of the decree already passed—vide *Narayana Gajapati Raju* v. *Narasimhulu*[1].

The civil revision petitions are therefore allowed with costs and the order of the learned Deputy Collector is set aside.

(C. R. Ps. Nos. 2393 of 1939 and 1641 of 1940).—These two revision petitions arise out of successive applications made under section 15 of Madras Act IV of 1938, in respect of the same land. The deposit for fasli 1347 was a sum of Rs. 211-8-0. The deposit for fasli 1346 was a sum of Rs. 282 which appears to be the net rent according to the agreement. By the terms of the agreement, the rent carries interest at 12 per cent. Whether or not this agreement would be effective after the land becomes part of an ' estate ' under the amended Madras Estates Land Act, it is clear that interest under section 61 of the Madras Estates Land Act, was payable as part of the rent which was in arrears. Admittedly no interest whatever has been deposited. The deposit made in the Revenue Court was, therefore, not a deposit of the whole of the rent for either of these two faslis.

The revision petitions are allowed with costs and the applications to the Revenue Divisional Officer are dismissed.

(C. M. A. No. 400 of 1940).—This appeal relates to the execution of the decree which is the subject-matter of civil revision petitions 2392 of 1939 and 1647 of 1940 in which judgment has just been pronounced. The decree is one for possession and mesne profits until delivery. We have already held that there is no question of treating this decree as a decree for rent to be satisfied by a deposit under section 15 of Madras Act IV of 1938. A valid objection to the execution which does not appear to have been considered in the lower Court arises out of the fact that mesne profits have been claimed for seven years from 1932. The decree was actually passed on 21st February, 1934. Under Order 20, rule 12 (1) (*c*) (*iii*), Civil Procedure Code, mesne profits can only be decreed for three years after the date of the decree. In the case of *Ayyavaru Setti* v. *Kichamma*[2] we had to deal with the case of a decree which provided for mesne profits till realisation without specifying any limit

1. (1942) 2 M.L.J. 359. 2. C. M. A. No. 321 of 1940.

other than the date of realisation. We held that the decree must be read as one providing for mesne profits till delivery of possession subject to the statutory limit of three years. The same interpretation must be placed on the present decree and we must read it as giving the decree-holder a right to mesne profits till delivery of possession subject to the limit of three years. Execution will therefore proceed for mesne profits up to 21st February, 1937, subject to the adjustment of any payments which may have been made.

The respondent (decree-holder) will be entitled to recover only the proportionate court-fee paid in the lower Court together with other costs, and each party will bear his own costs in this appeal.

K.S. ——— *Petitions and appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Grandhe Sarabhayya and others .. *Appellants** (*Accused*).

Criminal Procedure Code (V of 1898), section 342—"Circumstance against him"—Forged document—Several persons tried together—Person's name appearing on document—No other evidence—Judge whether may question accused—Legality of conviction.

Section 342 of the Criminal Procedure Code enables the Court to put questions to the accused for the purpose of enabling him *to explain any circumstance appearing in evidence against him.* Any statement made by an accused person as a result of questions improperly put to him cannot be taken into account against him.

Where in a prosecution for an offence under section 467, Indian Penal Code, the accused were asked what they had to say about the case, and the second and third accused said that the document said to be forged was written by the third accused under the instructions of P.W. 1 jointly with the second accused and it was contended that the judge ought not to have put questions to the second and third accused which elicited the replies regarding the third accused, inasmuch as there was no evidence that the document was written by the third accused or signed by him as a writer,

Held, that the mere fact that the name of the third accused appeared on the document was not "a circumstance against him" and that the judge should not have questioned him under section 342, Criminal Procedure Code, and that his conviction should consequently be set aside.

Appeals against the order of the Court of Session of the Kurnool Division, dated 9th March, 1942 and passed in C. C. No. 6 of 1942.

S. Vepa and *J. Krishnamoorthy* for Appellants.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court delivered the following

JUDGMENT.—The third accused (appellant in C. A. No. 206 of 1942) has been convicted by the Sessions Judge of Kurnool of an offence punishable under section 467, Indian Penal Code and sentenced to two years' rigorous imprisonment. Accused 1 and 2 (appellants in C. A. Nos. 205 of 1942 and 206 of 1942, respectively) have been found guilty of abetting that offence and have been sentenced to three years' rigorous imprisonment.

The document which is said to be forged is a karar or relinquishment deed; and it is the prosecution case that this document was forged in order to support the title of the second accused—and incidentally that of the first accused's father—in a dispute between the second accused and his brother, P. W. 1.

The principal evidence that this document is forged is that of P.W. 2, supported by P. Ws. 3 and 4, that this karar which purported to have been executed five years before was shown to P. W. 2 and he was asked to attest it. Fortunately for him and for the complainant, P. W. 1, P. W. 2 did not meekly attest this document but read it through. He then suspected that this might not be a genuine document and insisted on taking it away in order to show it to P. W. 1, who according to the document had executed it. P. W. 3 heard the first accused and P. W. 2 arguing about this karar and the latter saying that he would take it away and show it to respectable people to find out if it was genuine. P. W. 4 was the first person to whom P. Ws. 2 and 3 showed the document. There are no adequate reasons for doubting the truth of this evidence. The document has been produced and it

* Crl. Appeals Nos. 205 and 206 of 1942. 1st September, 1942.

purports to have been written by the third accused. These witnesses are of a different community from that of the parties, and although it appears that P.Ws. 3 and 4 have appeared on opposite sides in two litigations to that in which relatives of the first accused appeared ; yet nothing has been said against the evidence of P. W. 2 ; and there is no reason to doubt that P. Ws. 3 and 4 also knew of what had happened on the day when P. W. 2 says that the second accused showed him the document.

When the accused were asked what they had to say about the case, the second and third accused said that the karar was written by the third accused, but that it was done under the instructions of P. W. 1 jointly with the second accused. It is argued that the Judge ought not to have put questions to the 2nd and 3rd accused which elicited these replies from them. With regard to the third accused, I think this objection is well founded. There is no evidence that he forged the document or had anything to do with the forgery. His name appears on the document ; but nobody was asked whether the signature or the writing of the body of the document was in the hand of the third accused ; and so there was no evidence that the document was written by the third accused or signed by him as a writer. It is not, in the words of section 342, Criminal Procedure Code, " a circumstance against him " that his name appears on the document, unless there is reason to believe that his name appeared there with his knowledge. If there were no circumstances appearing against the third accused in the evidence, then unquestionably the learned Sessions Judge should not have put him any questions at all ; because section 342 says that the Court shall put questions to the accused for the purpose of enabling the accused *to explain any circumstance appearing in evidence against him.* Any statement made by an accused person as a result of questions improperly put to him could not therefore be taken into account against him. That means that there was no case against the third accused and he should have been acquitted.

The same argument has been put forward with regard to the second accused, but his case is not quite the same. I agree with Mr. Vepa that the letter purporting to have been written to P. W. 1 by the vakil of the second accused is not evidence against the second accused ; because the vakil was not examined and nobody has stated that the letter was in the handwriting of the vakil. Moreover, in order to make it admissible it would have been necessary to prove that the second accused had in fact given the instructions to his vakil which the vakil says in the letter were given to him. Nevertheless, there is one circumstance appearing against the second accused, and that is that sometime after P. W. 1 had sent a registered notice through his vakil to the second accused, this forged document came into existence. This is perhaps only a small piece of circumstantial evidence which would not in itself be sufficient to warrant a conviction ; but it is sufficient to justify the questions put by the Court to the accused under section 342. If a question is properly put to an accused person, and he chooses to make a statement which inculpates himself, then I find no reason to think that his answer cannot be taken into account because that answer was not strictly necessary for the explaining away of the circumstances appearing against him. The admission of the second accused in his statement that the document was drawn up by the third accused at the joint request of himself and P. W. 1 is therefore evidence that the second accused abetted what has been found to be the forging of a document. It does not follow that because the principal is acquitted no person can be punished for abetment. For the first accused it has been argued that it was his father who was really interested in this litigation ; and so it is possible that although P. W. 2's evidence that the first accused asked him to attest the document may be true, yet it does not prove that the first accused knew the document to be forged. As to that, it has to be noted that the interests of the first accused and his father are the same, that the first accused's father is an old man of 70 years of age, and that the first accused is now the manager of the family. The first accused must have known that the document was forged ; for if it had been genuine, it would not have been necessary five years after the date shown on the document, to get it attested. I therefore agree with the learned Sessions Judge that the case against the first accused has been made out.

The offences are serious ones ; and I do not consider the sentences excessive.

The appeal of the third accused is allowed and his conviction and sentence set aside. The convictions and sentences on the first and second accused are affirmed and the appeals so far as they relate to these accused are dismissed.

B.V.V. ——— *Appeals allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

Yella Venkatasubbayya and another .. *Appellants** (*5th Respondent and nil*)

v.

Yella Venkataramayya and others .. *Respondents* (*Appt. and Respts. 1, 2 and 6.*)

Hindu Law—Conversion of father to Christianity—Effect on joint family—Division in status—Re-union with minor son not possible.

The plaintiff's father and mother were converted to Christianity on the 2nd December, 1927, and at that time the plaintiff was only three years of age. The father continued to regard himself as being joint with his son. The father lived as a Hindu and he married his son and three of his daughters to Hindus, according to Hindu rites. In 1928, he was re-converted to Hinduism. The son did not attain his majority till the 1st July, 1932. On the 10th March, 1930, the father created a mortgage of family properties which were subsequently sold on 24th January, 1935, subject to the mortgage at the instance of another creditor of the father. In a suit for partition, on the question whether the son's interest in the properties were affected by the mortgage or sale,

Held, that the embracing of Christianity by the father effected a division in status and once the family had become divided it could not become re-united without the consent of the son and during his minority he was not in a position to give his consent.

Babu alias Govindoss Krishnadoss v. *Gokuldoss Govardandoss*, (1928) 55 M.L.J. 132, distinguished.

As at the time of the mortgage and sale the son was a minor and had divided from his father as the result of his father becoming converted to Christianity nothing that the father himself did subsequently could affect the son's interest in the family properties. Accordingly the son is entitled to a decree for partition unaffected by the alienations.

Venkatramayya v. *Seshayya*, (1941) 2 M.L.J. 877, affirmed.

Appeal under clause 15 of the Letters Patent against the judgment and decree of Patanjali Sastri, J., (1941) 2 M.L.J. 877, dated 3rd October, 1941, and passed in S. A. No. 906 of 1938, preferred to the High Court against the decree of the Court of the Subordinate Judge of Guntur in A. S. No. 94 of 1937 (O. S. No. 221 of 1935, District Munsiff's Court, Guntur).

K. Kotayya for Appellants.

V. Rangachari and *S. Sitarama Aiyar* for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—The plaintiff in the suit out of which this appeal arises was the first respondent, who is the son of the second respondent. The first respondent sued in the Court of the District Munsiff of Guntur for partition of the family properties and in effect for a declaration that he was not bound by certain alienations made by his father. The plaintiff's father and mother were converted to Christianity on the 2nd December, 1917. Up to then the father and son constituted a joint Hindu family. At the time of the conversion the first respondent was only three years of age. The evidence shows that the father continued to regard himself as being joint with his son. He lived as a Hindu and he married his son and three of his daughters to Hindus, the marriage ceremonies being performed according to Hindu rites. In 1928, he was re-converted to Hinduism. The son did not attain his majority till the 1st July, 1932. On the 10th March, 1930, the second respondent created a mortgage over the properties described in Schedule A to the plaint in favour of one S. Ramaseshayya, the fourth defendant in the suit. Ramaseshayya assigned his mortgage to the firm of Jivaji Zassaji, the fifth defendant. The fifth defendant subsequently assigned the mortgage to the second appellant. In the month of November, 1930, the second respondent obtained a loan from the Pedavadlapudi Co-operative Society. This loan was not repaid and as the result the

*L. P. A. No. 4 of 1942. 5th January, 1943.

Society obtained an award which it executed on the 21st January, 1935, by selling the properties described in Schedule A, subject, of course, to the mortgage. The purchaser was the first appellant. The question which the Court has to decide is whether the plaintiff's interests in these properties are affected by the mortgage or the sale.

The embracing of Christianity by the second respondent effected a division of status. This was the decision of the Privy Council in *Abraham* v. *Abraham*[1].

For the appellant it has been argued that, notwithstanding that the conversion of the second respondent to Christianity effected a severance, it was open to him to re-unite with his sons. Patanjali Sastri, J., from whose judgment this appeal has been preferred, held that he could not re-unite during the minority of the first respondent. We agree with the learned Judge. Once the family had become divided, it could not become re-united without the consent of the first respondent and during his minority he was not in a position to give his consent.

In the course of the arguments reference has been made to the judgment of Venkatasubba Rao, J., in *Babu* alias *Govindoss Krishnadoss* v. *Gokuldoss Govardandoss*[2] and it has been suggested that this is an authority for the proposition that re-union was possible during the minority of the first respondent. The facts in that case are very different from the facts of this case. There two adult brothers separated. They each had a minor son. Venkatasubba Rao, J., considered that there was nothing in Hindu law to prevent a brother from entering into a re-union with another brother, and the effect of such re-union would make their respective sons members of the re-united family. It is unnecessary to consider whether that opinion is open to criticism, because we are not concerned with a partition between brothers. Here we are concerned merely with severance between a father and son as the result of the father becoming converted to Christianity. When the transactions with whioh this appeal is concerned were entered into, the son was a minor and had become divided from his father as the result of his father's action. Nothing that the father himself did subsequently could affect the interests of the first respondent in the family properties, which means that the first respondent was entitled to the decree which was granted to him for partition, unaffected by the mortgage of the 10th March, 1930 and the sale of the 24th January, 1935.

It has been suggested that the first respondent is estopped from contending that the transactions are not binding upon him. The basis for this contention is the fact that in three documents, one executed in 1932 and two in 1933, he had been described as being the undivided son of his father. The fact that these documents were all entered into after he had attained majority does not estop him from challenging the validity of transactions entered into by the father during his minority.

The appeal fails and must be dismissed with costs in favour of the first respondent.

K.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

The District Magistrate, Cuddappah .. *Referring Officer.**

Madras Public Health Act (III of 1939), section 34—Easement right to allow water to run into neighbour's land—Water running from there into the public street—Liability.

Though an owner of land has an easement right to allow his water to run into his neighbour's land, if however that water runs from there into the public street, the owner is punishable under section 34 of the Public Health Act (1939).

Case referred for the orders of the High Court under section 438, Criminal Procedure Code, by the District Magistrate, Cuddappah, in his letter, Reference C-1 No. 2091/1941, dated 19th April, 1942.

A. S. Sivakaminathan for the Public Prosecutor (*V. L. Ethiraj*) for the Crown.

---

1. (1863) 9 M.I.A. 195.
2. (1928) 55 M.L.J. 132.

*Crl. R. C. No. 300 of 1942. (Case Ref. No. 27 of 1942). 24th July, 1942.

The Court made the following

ORDER.—The accused in this case was charged under section 34 of the Public Health Act of 1939 with allowing sewage water to run into a public street. The accused seems to have pleaded guilty, but at the same time given an explanation which the District Magistrate considers to have amounted to a plea of "Not guilty."

As I understand the accused's explanation, he has an easement right to allow his water to run into his neighbour's land, but apparently that water runs from there into the public street. Even though he is allowed to run the water into his neighbour's land, he is nevertheless punishable under the section under which he is charged; for he caused the water to run into the public street through his neighbour's land.

No interference in revision is called for.

The reference is returned.

K.S. *Reference returned.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Pachayappa Udayan .. *Petitioner** (*Petitioner*)

v.

Ponna Goundan and others .. *Respondents* (*Ctr.-Petitioners*).

Criminal Procedure Code (V of 1898), section 145—Person re-entering into possession after expiry of period of ex parte *order against him—If wrongful dispossession of person who obtained temporary possession under the* ex parte *order.*

If a person in possession of property is temporarily dispossessed by an *ex parte* order under section 144 of the Criminal Procedure Code and his application to set aside that order is dismissed only on the ground that the time for which the order was in force had already expired, the re-entry into possession by the person so dispossessed cannot be considered to be wrongful dispossession of the person who obtained temporary possession on account of the *ex parte* order.

Petition under sections 435 and 439 of the Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of the Sub-Divisional First Class Magistrate of Dharmapuri, dated 6th April, 1942 and made in M. C. No. 92 of 1941.

N. Somasundaram for Petitioner.

G. Natarajan for Respondents.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—This petition was admitted because the learned Magistrate in considering an application made before him under section 145, Criminal Procedure Code, did not give very clear findings.

The question that fell for his consideration was this: who was in possession on the date of his preliminary order, which was the 13th November, 1941. In paragraph 5 of his order, in which he sums up his findings, he mixes up questions of title and possession instead of confining himself to the relevant question above framed. In some sentences he seems to give a definite finding that D. W. 1 was in possession and even seems to express an opinion that he was always in possession except for a very short time. On the other hand, there are other sentences in this paragraph which have given room for the argument that the Magistrate had lost sight of the only point that he had to consider. He said for example,

"P. W. 1 has not taken delivery of possession of the land from P. Ws. 3 and 4 legally;"

which sentence suggests that P. W. 1 got into possession though he had no title. Later on he says

"P. W. 1's possession of the land for some time by virtue of Ex. A and by the order in M. C. No. 74 of 1941 do not give him full title and right to continue in possession of the land."

---

*Crl. R. C. No. 313 of 1942. 19th August, 1942.
(Crl. R. P. No. 305 of 1942).

That sentence is irrelevant to the application, but it suggests that P. W. 1 got into possession not only because of the order under section 144, Criminal Procedure Code, in M.C. No. 74 of 1941 but also by virtue of his title deed; the learned Magistrate finding that although he had possession he did not have the full title and right to continue in possession. Reading paragraph 5 as a whole, however, and having reference to paragraph 2 of the judgment, I feel satisfied that the learned Magistrate found that D. W. 1 was in possession except during the time when he was deprived of possession in pursuance of the *ex parte* order passed under section 144, Criminal Procedure Code.

A Magistrate is not bound to order possession to be given to the person who was in possession two months before the passing of the preliminary order; but under the first proviso to clause (4) of section 145, Criminal Procedure Code, he may treat the party dispossessed forcibly and wrongfully within two months as having been in possession on the date of the preliminary order. The argument of the learned advocate for the petitioner is that his client got lawfully into possession by virtue of the order under section 144, Criminal Procedure Code, and that therefore when D. W. 1 again entered into possession after the time fixed in the order under section 144 expired, he obtained possession wrongfully. The evidence indicates that the order which gave the petitioner temporary possession of the land was obtained *ex parte*, and that when D.W. 1 applied to the Magistrate to set aside that order, he was told that as by the time the petition came up for hearing the month for which he had passed the order under section 144 had already expired, it was unnecessary for him to reconsider his earlier order. If a person in possession of property is temporarily dispossessed by an *ex parte* order of this sort and his application to set aside that order is dismissed only on the ground that the time for which the order was in force had already expired, I should not consider that the re-entry into possession by the person so dispossessed was wrongful dispossession of the person who obtained temporary possession on account of the *ex parte* order.

On what seems to be the finding of fact of the Sub-Divisional Magistrate, I do not think any interference in revision is called for. The petition is dismissed.

K.S. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

K. Ramabrahmam .. *Appellant** (*Opposite party*)

v.

The Traffic Manager, Vizagapatam Port .. *Respondent* (*Applicant*).

Workmen's Compensation Act (VIII of 1923)—Accident in the course of employment—Test.

An accident in order to give rise to a claim for compensation must have some relation to the workman's employment and must be due to a risk incidental to that employment as distinguished from a risk to which all members of the public were alike exposed.

McCullum v. *Northumbrian Shipping Co., Ltd.*, (1932) 147 L.T. 361, applied.

Accordingly, where a workman in a harbour (whose hours of work were from 2 P.M. to 10 P.M.) worked from 2 to 7-30 P.M., left to take some coffee and while returning to work crossed a railway line and was killed by an engine running into him, and it was found that in crossing the railway line he was following the usual practice of the workmen engaged in the harbour and that the notice prohibiting the crossing of the railway lines was not an effective prohibition, the accident is one which arose out of and in the course of his employment.

Appeals against the orders of the Court of the Commissioner for Workmen's Compensation, Madras, dated 26th August, 1941, and made in Cases Nos. 131 and 132 of 1941, respectively.

V. Govindarajachari and *N. Vasudeva Rao* for Appellant.

D. V. Reddi Pantulu for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—These two appeals can be conveniently dealt with in one judgment. They arise out of proceedings under the Workmen's Compensation Act.

*A. A. O. Nos. 678 and 679 of 1941. 7th January, 1943.

On the night of the 21st October, 1940, two workmen named Thandrangi Sanyasi and Kotina Simhachalam respectively were killed within the premises of the Vizagapatam harbour. They were coolies who were employed by the appellant, a contractor of the Port authorities. The Traffic Manager of the Port deposited with the Commissioner for Workmen's Compensation the sum of Rs. 1,100 as the amount payable to the dependents of the deceased workmen under the Act. The appellant had given an indemnity to the Port authorities and consequently the traffic manager applied under section 12 (2) for an order of indemnification. The Commissioner held that the accident arose out of and in the course of employment and therefore the Port authorities were entitled to be indemnified by the appellant. The appeal is from that order. It is common ground that if the accident arose out of and in the course of employment the order of the Commissioner must stand.

The facts are very simple. The appellant employed the two workmen for loading manganese ore into skips at a dump within the harbour premises. The hours of work were from 2 P.M. to 10 P.M. It was usual for the workmen to take refreshment in turns after they had worked for several hours. On the 21st October, 1940, the deceased workmen worked from 2 to 7-30 P.M. when they left the harbour premises in order to drink some coffee. They apparently did not ask for permission to go, but nothing turns on this, because, as we have mentioned, it was usual for the workmen to go away for short periods when convenient. The deceased workmen having partaken of coffee returned to the harbour premises to resume their work. They took a short cut which necessitated their crossing certain railway lines. While they were crossing these lines a railway engine ran into them and both were killed. There is a notice prohibiting persons from crossing the railway lines but the evidence of the foreman of the yard is that it was usual for workmen in the harbour premises to cross the lines in spite of the prohibition. The Commissioner has found that this practice has been "permitted, connived or winked at" by the employers of labour or responsible officials of the Port.

Now can it be said that the accident which befell these workmen arose "out of and in the course of their employment"? We think it can. In *McCullum* v. *Northumbrian Shipping Company, Limited*[1] Lord Macmillan observed that few words in the English language had been subjected to more microscopic judicial analysis than these, and in the effort to expound them many criteria had been proposed and many paraphrases suggested. But it was manifestly impossible to exhaust their content by definition, for the circumstances and incidents of employment were of almost infinite variety. This at least, however, could be said, that the accident in order to give rise to a claim for compensation must have some relation to the workmen's employment and must be due to a risk incidental to that employment as distinguished from a risk to which all members of the public were alike exposed.

In leaving their work to take refreshment at 7-30 P.M. these workmen did what they were entitled to do. In fact it would manifestly be impossible for them to do this heavy work from 2 P.M. to 10 P.M. without some break. They left the harbour premises and returned and having entered the premises they sought the nearest way to the place where the manganese ore was being loaded. In crossing the railway lines they were following the usual practice of the workmen engaged in the harbour. The prohibition was not an effective prohibition. The responsible officials of the harbour in fact connived at its being disregarded. In other words, the notice might never have been there. Having entered the harbour premises and having met with an accident in the circumstances which we have related we consider their dependents are entitled to compensation. The risk which they ran was incidental to their employment and arose out of it.

The order of the Commissioner must be confirmed and the appeals dismissed with costs in A. A. O. No. 678 of 1941.

K.S. —— *Order confirmed.*

1. (1932) 147 L.T. 361.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

Vemuri Nagiah and another .. *Appellants** (*Petitioning Creditors*)

v.

Vasi Reddi Venkata Satyanarayana Prasad and others .. *Respondents* (*Debtors*).

Presidency Towns Insolvency Act (III of 1909), section 13 (4)—Creditors' application for adjudication of debtors as insolvents—Application alleging facts not true—Deposit of moneys in Court by debtors—Refusal to receiver's payment by creditors—Petition for adjudicating, amounts to abuse of process.

An adjudication order was refused by the Court on an insolvency petition filed under the Presidency Towns Insolvency Act on the ground that it had been presented *mala fide* with an ulterior object. It was found that the creditors had refused to receive moneys deposited in Court though they were entitled to receive payment under an order of Court.

On appeal, *held*, that the conduct of the creditors in refusing to receive payment out of the moneys deposited in Court was sufficient proof of their *mala fides* and their action amounted to an abuse of the process of the Court.

Ex parte *Griffin*; In re *Adams*, (1879) 12 Ch.D. 480, followed.

On appeal from the order of Chandrasekhara Ayyar, J., dated 29th October, 1942, and made in the exercise of the Insolvency Jurisdiction of the High Court in Petition No. 54 of 1942, Application No. 229 of 1942.

C. Venugopalachari for Appellants.

M. S. Ramachandra Rao for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—This is an appeal from an order passed by Chandrasekhara Ayyar, J., dismissing a petition asking for the adjudication under the Presidency Towns Insolvency Act of the respondents. The learned Judge considered that the petition had been presented *mala fide* and that it amounted to an abuse of the process of the Court. We share in full this opinion.

On the 19th June, 1942, one A. Suryanarayana filed an application for the adjudication of the respondents. This is not the application which has given rise to this appeal, but in order to appreciate the situation it is necessary to examine in some detail what preceded the present application. The third respondent is the mother of the first and second respondents. They live at Bezwada where they own a cinema theatre. Suryanarayana was a creditor of theirs. They owed him the sum of Rs. 1,045. In his petition Suryanarayana alleged that they had a dwelling house and office at No. 2/355, Mint Street, Madras. This they denied and the affidavit which was filed by the first respondent in answer stated that they were never residents of Madras. The first respondent had visited Madras in November, 1940, but had not been here since. His brother used to visit Madras but his mother never came here, and in no sense were they residents of this city. We see no reason to doubt the truth of these statements. The acts of insolvency alleged against the respondents were that they had with intent to defeat and delay their creditors departed from their dwelling house in Madras, that they had mortgaged their properties for Rs. 24,000 with like intent, and that they had disposed of other properties in order to place them beyond the reach of their creditors. In reply to the affidavit which was filed by A. Suryanarayana in support of the petition, the respondents set out a statement of their assets and liabilities. According to this statement, the assets amount to Rs. 2,31,040 and their debts to only Rs. 25,743, secured and unsecured. It was stated that the respondents were able to pay all their debts and that no act of insolvency had been committed.

---

*O. S. A. No. 57 of 1942. 21st January, 1943.

On the 19th August, 1942, the respondents applied under the provisions of section 13 (4) (*b*) for an order permitting them to deposit in Court sufficient to pay their unsecured creditors. After the filing of the application for adjudication, the petitioner obtained an interim order asking the Official Assignee to take possession of the assets. The Official Assignee took possession of the cinema theatre at Bezwada and by the time the application under section 13 was made he had collected the sum of Rs. 4,740. The learned Judge sitting in Insolvency, after an investigation into the position, came to the conclusion that if the respondents furnished security in the sum of Rs. 9,000 they would be entitled to the dismissal of the petition. They were given time until the 30th September, in which to furnish the security. Security was tendered, but the Court considered it insufficient. Thereupon the respondents deposited in Court in cash the sum of Rs. 9,000 which with the Rs. 4,740 collected by the Official Assignee, was more than sufficient to pay off the unsecured creditors. When this deposit was made the petition was dismissed.

Realising that the first petition was likely to be dismissed the appellants on the 5th September, 1942, filed the petition which has given rise to the appeal. The first appellant is the assignee of promissory note executed by the first respondent and the assignee of one executed by the third respondent. Both these instruments were assiged to him on the 30th August, 1942, the day before Chandrasckhara Ayyar, J., passed his order on the respondents' application under section 13. The second appellant is the assignee of a promissory note executed by the second respondent. He acquired this note on the 15th June, 1942, four days before the filing of the first petition. The second appellant filed an affidavit in support of the first petition.

Out of the Rs. 13,740 lying in Court, Suryanarayana was entitled to withdraw his debt of Rs. 1,045 but he has not applied for the withdrawal of his money. The appellants were offered payment out of the funds in Court, but they both refused. As a matter of fact, on the 3rd August, 1942, the second appellant was offered out of Court payment of the amount due to him. A draft on a bank in Madras was tendered to his advocate, but he refused to accept it.

The allegations in the present petition are that the respondents had conveyed certain wet lands for the inadequate price of Rs, 7,000 with the object of putting the property beyond the reach of their creditors and for the purpose of reserving to themselves "a secret beneficial interest", that they agreed to sell for Rs. 10,000 certain building sites in Masulipatam worth Rs. 20,000 with a similar object ; that they had distributed the Rs. 7,000 received on the sale of the first property to bogus creditors, and that they had fraudulently preferred other creditors.

All the material facts had been disclosed in the proceedings which followed the presentation of the first petition and the learned Judge was fully acquainted with the position. In his affidavit filed in opposition to the first petition the first respondent averred that the person behind the application was the Zamindar of Challapalle who had been inimically disposed towards them since March, 1942 and was trying his best to humiliate them. There is no finding that the Zamindar of Chellapalle is behind these petitions and it is unnecessary for us to decide whether the allegation against him is well-founded. At the same time it is obvious that there is some one behind these petitions and that neither was filed *bona fide*. The fact that the petitioner in the first petition and the petitioners in the present case have refused to receive payment out of the monies in Court, although they were entitled to receive payment under an order of the Court are sufficient to show that these applications have not been made *bona fide* and that they have been persisted in with an ulterior object.

The evidence on the record is sufficient to satisfy us that the respondents are able to pay their debts. Their assets are considerably in excess of their liabilities. Moreover, an amount sufficient to pay the unsecured creditors is lying in Court. The learned Judge was satisfied, as we are, that the appellants are merely tools in the hands of others and that their action in presenting the petition is thoroughly

dishonest, which means that their action amounts to an abuse of the process of the Court.

Mr. Venugopalachari on behalf of the appellants, has contended that even though the present petition was presented *mala fide* his clients are entitled to an order for adjudication and in this connection has referred to the decision of the Privy Council in *King* v. *Henderson*[1]. That case, however, was not like the present one, an appeal against an order refusing to adjudicate. It arose out of a suit for damages for malicious presentation of a bankruptcy petition where different considerations arise. In such a case the principles which apply in an action for malicious prosecution apply, and the plaintiff must show, not only that the action was taken maliciously but that it was taken without reasonable and probable cause. Cases which are in point are *In re Davies* Ex parte *King*[2] and Ex parte *Griffin* In re *Adams*[3]. In the former of these cases it was held that where a bankruptcy petition had been made use of to extort money from the debtor, the Court would refuse to make an adjudication, even though there was a debt owing to the petitioner and an act of bankruptcy had been committed. In *Ex parte Griffin* In re *Adams*[3], the Court refused to make an adjudication order on a bankruptcy petition which had not been presented with the *bona fide* view of obtaining an adjudication, but for a collateral purpose and with the object in view of putting pressure on the debtor. The present application, like the first, was not filed for the purpose of having the respondents' assets distributed proportionately amongst their creditors, but with the object of injuring their credit by dragging them into the Insolvency Court and was persisted in notwithstanding the fact that the Court had permitted the appellants to be paid out of the funds in Court. The action of the appellants cannot be condemned too strongly.

The appeal will be dismissed with costs, which we fix at Rs. 350 for the senior counsel and two thirds of this amount for the junior counsel. There will be no further taxation.

K.C. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Yakub Sahib Yejaman and others .. *Petitioners* (Accused).*

Criminal Procedure Code (V of 1898), section 106—Scope.

An order under section 106 of the Criminal Procedure Code can be passed at the time of passing sentence and it is not necessary that the trial Court or appellate Court should call upon the accused to show cause why he should not be bound over.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the Sub-Divisional First Class Magistrate of Dharmapuri, dated 23rd December, 1941 in Criminal Appeal No. 102 of 1941 (C. C. No. 468 of 1941, Stationary Sub-Magistrate's Court, Harur).

K. S. Sundaram and *P. S. Sundaram* for the Petitioners.

The Court made the following

ORDER.—Section 106 of the Criminal Procedure Code permits of the passing of an order under that section at the time of passing sentence. It is not therefore necessary that either the trial Court or the appellate Court should call upon the accused to show cause why he should not be bound over.

The sentence is very moderate. The petition is dismissed.

K.S. ——— *Petition dismissed.*

1. (1898) A.C. 720. 2. (1876) 3 Ch.D. 461.
3. (1879) 12 Ch.D. 480.

*Crl. R. C. No. 267 of 1942.
(Crl. R. P. No. 253 of 1942). 25th June, 1942.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Insolvency Jurisdiction).

PRESENT :—MR. JUSTICE CHANDRASEKHARA AYYAR.

The Official Assignee .. *Applicant**

v.

C. Manickavelu Mudaliar .. *Respondent* (*Insolvent*).

Presidency Towns Insolvency Act (III of 1909), section 52 (2) (a)—Commutation of pension and receipt of a lump sum by insolvent—Official Assignee entitled to claim the amount in the hands of the insolvent for the benefit of the creditors.

After-acquired property of an insolvent, vests in the Official Assignee. No doubt where money is payable to an insolvent as pension month after month it is not attachable and therefore beyond the reach of the Official Assignee. But it sheds this character as soon as it is converted into a lump sum payment as the result of commutation and becomes subject to the claim of the Official Assignee.

Where it is sought to compel the insolvent to bring back the money that he received by commuting his pension it is no answer to say that he had paid the money to his creditors and that until the Official Assignee intervenes the transactions are valid against the Official Assignee.

It is the obvious duty of such an insolvent to inform the Official Assignee of the receipt of the commutation amount and to place the sum of money into the hands of the Official Assignee for the benefit of his creditors.

Application under section 7 of the Presidency Towns Insolvency Act for directions.

The Official Assignee (*V. Thyagaraja Ayyar*) in person.

V. Varadaraja Mudaliar instructed by *V. Krishnan* for Insolvent.

The Court delivered the following

JUDGMENT.—The Official Assignee took out this application for an order to direct the insolvent Manickavelu Mudali to pay to him from and out of the commutation sum received by him a sum of Rs. 5,700. The insolvent was the Head Clerk in the Office of the Post-Master General, Madras, on a salary of Rs. 220, per mensem. He retired from service from the 1st June, 1941 on a pension of Rs. 101-10-0. He commuted one half of his pension and received a consolidated sum of Rs. 7060-14-0 as commutation. He did not pay any portion of this commutation sum to the Official Assignee, nor did he appear before him for examination though called upon to do so. The Official Assignee had to obtain a warrant on the 11th September, 1941.

The insolvent told the Official Assignee that he had paid most of the amount received by him to his creditors and he handed over a sum of Rs. 500 only to the Official Assignee. He then gave a list of persons to whom he made payments and of what amounts. The Official Assignee was not satisfied with the story and has come forward with this application. Dividends to the extent of 0-3-9 have been declared, but the Official Assignee is of opinion, and rightly if I may say so, that more could be realised from this insolvent for the benefit of the creditors.

It was contended on behalf of the insolvent by Mr. Varadaraja Mudaliar that the commutation amount received by his client would not vest in the Official Assignee as it partakes of the nature of pension. He also argued that the payments made by the insolvent could not be questioned by the Official Assignee as there was no intervention by him before the payments were made.

Both the contentions appear to me to be untenable. The decision in *Gopalachariar* v. *Deepchand Sowcar*[1], has little bearing on the question now at issue. There Pandrang Row, J. held that an amount that was in process of transmission through post to a retired Government servant as commutation of his pension was not liable to attachment at the hands of his creditors ; and he came to this conclusion because of the particular language employed in section 11 of the Pensions Act, which provides—I am omitting the unnecessary words—that 'no money due or to become due on account of any such pension or allowance shall be liable to seizure, attach-

*Application No. 443 of 1941 in Insolvency Petition No. 183 of 1934. 9th February, 1942.

1. (1940) 2 M.L.J. 782: I.L.R. 1941 Mad. 393.

ment or sequestration.' The learned Judge held that the amount was money due on account of pension. We have no such language to construe in the case before us. After-acquired property of an insolvent vests in the Official Assignee, though, so long as the money was payable as a pension month after month, it was not attachable and was therefore beyond the reach of the Official Assignee. But it shed this character as soon as it was converted into a lump sum payment as the result of commutation. It was so held in *Municipal Council Salem* v. *Gururajah Rao*,[1]. In that case the distinction between a pension and a commuted sum of money in lieu of pension was pointed out, following the decision in *Crowe* v. *Price*[2], where it was decided that commutation money was alienable and liable to be taken in execution. Two cases relating to provident fund deposits are found reported in *Ranganayaki Ammal* v. *The Official Assignee of Madras*[3], and *Walchand Molaji* v. *Charles A. Williams*[4], where also it is pointed out that once the money ceases to be a compulsory deposit and comes into the hands of the insolvent, it becomes subject to the claim of the Official Assignee.

The well-known case of *Cohen* v. *Mitchell*[5], dealing with after-acquired property has no relevancy to the point now under consideration. It is perfectly true that, until the trustee intervenes, all transactions by a bankrupt after his bankruptcy with any person dealing with him *bona fide* and for value in respect of his after-acquired property, whether or not with knowledge of the bankruptcy, are valid against the trustee. If the Official Assignee were attempting now to recover amounts that the insolvent says he paid to his creditors, the applicability of *Cohen* v. *Mitchell*[5], may arise for consideration. But the present application is directed against the insolvent and is to compel him to bring back the money that he received by commuting his pension. The insolvent has and can have no valid answer.

The insolvent was examined by me. He has no accounts. He says he paid several sums out of the amount to creditors to whom he owed moneys in respect of advances made by them from time to time and for a series of years. Out of these creditors, one is his wife Jagadeeswari Ammal to whom he gave Rs. 2,235 ; another is his mother-in-law Sundarammal to whom he alleges he paid Rs. 500 ; and the third is Punyakoti Mudaliar a relation of his who got Rs. 1,225. Vouchers have no doubt been produced ; but it is easy to obtain them from near relations. It must also be noted that the account he gave to the Official Assignee in the first instance of how he spent the commutation amount is different in material particulars from his present account. When he was originally examined he mentioned only a few creditors and accounted for Rs. 4,695, besides the sum of Rs. 500 that he paid to the Official Assignee. He has now increased the number of his creditors and shown larger amounts as due to them and as paid by him and in his counter-affidavit filed on the 5th January, 1942, he has for the first time introduced several items of expenses for medical treatment for himself and his sons, expenses for his own maintenance, train fare, etc., payment of petty debts, clothing for himself and his family and children, and money spent on a southern tour on pilgrimage.

I am clearly convinced that the insolvent has not been honest in the matter of this commutation amount that he received. It was his obvious duty to inform the Official Assignee of the receipt and to have placed the sum of money into the hands of the Official Assignee for the benefit of his creditors. He has failed to account satisfactorily for the disposal of the amount. I am of the opinion that he must bring into Court or pay to the Official Assignee at least the three sums of Rs. 1,225, 2235, and 500 which he says he paid to Punyakoti Mudaliar, Jagadeeswari Ammal and Sundarammal, and he will have a month for doing this. If he commits default in payment, necessity will arise for taking proceedings for contempt against him.

K.S. —— *Ordered accordingly.*

---

1. (1934) 68 M.L.J. 118: I.L.R. 58 Mad. 469.
2. (1889) 22 Q.B.D. 429.
3. (1930) 61 M.L.J. 354.
4. (1935) I.L.R. 59 Bom. 517.
5. (1890) 25 Q.B.D. 262.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MOCKETT.

Dondapati Ellappa and others .. *Appellants** (*Accused-Prisoners.*)

Ordinance (No. II of 1942)—Conviction by Special Judge under the Ordinance—No appeal lies in the ordinary way.

There is no right of appeal in the ordinary way against the conviction by a Special Judge under Ordinance No. II of 1942. The right of appeal is abrogated and only in certain cases can convictions be re-considered at all and that too, not by the High Court as such, but by a person designated by the Provincial Government, namely, the High Court Judge sitting under the provisions of the Ordinance.

Appeal against the order of the Court of the Special Judge of Chittoor Division under Ordinance No. II of 1942, in Ordinance Case No. 2 of 1942.

V. T. Rangaswami Aiyangar and *A. B. Viswanathan* for Accused.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court delivered the following

JUDGMENT.—The appellants were convicted before Mr. W. O. Newsam sitting at Chittoor as a Special Judge under Ordinance No. II of 1942. They were charged with various offences under the Defence of India Rules. In short, they were charged with sabotage of the railways by removing rails and fishplates on the permanent way. I am not concerned in any way with the facts. They were convicted and sentenced each to five years' rigorous imprisonment except in the case of accused 4, who was sentenced to five years' simple imprisonment. They have appealed against their conviction to this High Court and the Public Prosecutor takes the point that no appeal lies. I am quite satisfied that the point is a good one.

The ordinance makes provision for the present emergency for the trial of criminal offences and it has constituted certain special tribunals. There are Special Judges and Special Magistrates and Summary Courts as stated in clause 3. The offences which these tribunals respectively may try are set out in subsequent clauses. Under clause 7 the powers of a Special Judge are stated to be that he may pass any sentence authorised by law. Clause 8 is as follows :

> "If in any proceedings before a Special Judge a person convicted is sentenced to death or to transportation for life, or to imprisonment for a term of seven years or more or though no person is so sentenced, the Special Judge certifies that in his opinion the case has involved questions of special difficulty whether, of law or fact, or is one which for any other reason ought properly to be reviewed,
>
> the proceedings shall be submitted for review by a person nominated in this behalf by the Provincial Government which person shall be chosen from the Judges of the High Court having jurisdiction over the area for which the Special Judge is appointed, and the decision of that person shall be final."

In this case the person nominated must necessarily be a Judge of the High Court of Judicature of Madras. Mr. Newsam as a Sessions Judge was appointed as a Special Judge. I find no difficulty in understanding the meaning and intention of clause 8. It states that in the case of a death sentence or sentence of transportation for life or to imprisonment for seven years and in cases in Madras where the Special Judge thinks that there are questions of special difficulty, the proceedings will be reviewed by a person nominated by the Provincial Government and chosen from the Judges of the High Court of Madras. It is unnecessary to discuss in detail the sections immediately following. It is enough to say that they deal with Special Magistrates and their powers. Clause 13 provides for an appeal against a sentence of transportation or imprisonment for more than two years passed by a Special Magistrate and of the following clauses, clause 15 deals with the Summary Courts, and clause 19 provides for an appeal from the Summary Court to certain Magistrates named in the clause. Clause 6 deals with the procedure before the Special Judges and provides generally that the procedure prescribed in the Code for the trial of warrant cases shall be followed. Sub-clause (2) says,

> "In matters not coming within the scope of sub-section (1), the provisions of the Code, so far as they are not inconsistent with this Ordinance, shall apply to the proceedings of a Special Judge, and for the purposes of the said provisions the Court of the Special Judge shall be deemed to be a Court of Session."

*Crl. Appeal No. 650 of 1942. 29th January, 1943.

Having, as briefly indicated, provided for tribunals and procedure both by way of original trial and by way of appeal, clause 26 is as follows,

"Notwithstanding the provisions of the Code, or of any other law for the time being in force, or of anything having the force of law, by whatsoever authority made or done, there shall, save as provided in this Ordinance, be no appeal from any order or sentence of a Court constituted under this Ordinance and, save as aforesaid, no Court shall have authority to revise such order or sentence, or to transfer any case from any such Court, or to make any order under section 491 of the Code or have any jurisdiction of any kind in respect of any proceedings of any such Court."

The marginal note to that clause is "Exclusion of interference of other Courts."

Rao Bahadur V. T. Rangaswami Aiyangar has argued that in spite of these provisions, it cannot be said that the right of appeal from a Special Judge has been expressly taken away, that the right of appeal being precious for the liberty of the subject cannot be taken away by implication and that whatever the framers of the Ordinance may have intended, they have in fact not achieved their purpose of preventing an appeal from a conviction by a Special Judge being heard by the High Court in the ordinary manner under the Criminal Procedure Code. As this is a matter of considerable importance, I listened for some time and with all attention to Mr. Rangaswami Aiyangar's arguments. But I have not the slightest doubt that it is as clear as it can possibly be that Ordinance No. II of 1942 expressly deprives a person convicted before a Special Judge of the right of appeal in the ordinary way. The necessary meaning of the wording of clause 8 must be that the right of appeal is abrogated and that only in certain cases can convictions be reconsidered at all and that too not by the High Court as such but by a *persona designata* by the Provincial Government, namely, the High Court Judge sitting under the provisions of the Ordinance. But clause 26 makes any argument by inference unnecessary, because that clause expresses comprehensively and as clearly as is possible the intention of the Ordinance to exclude every form of appeal by any person convicted under this Ordinance, unless such appeal is expressly provided for and examples of those are to be found in clause 13—appeal from the Special Magistrate—and clause 19—appeal from a Summary Court. There is no appeal from a Special Judge. Instead, the provisions with regard to review are provided in clause 8 and then only in certain cases. In this particular case, the sentence being less than seven years, it will be seen that the provisions of clause 8 are not applicable for the purpose of review by the Judge chosen for that purpose by the Provincial Government. I am told that there is no previous decision on this point. That may well be because the provisions of the Code and the Ordinance are so clear that no one has thought of arguing otherwise.

In the result, I hold that no appeal lies which disposes of what is now before me purporting to be an appeal.

K.S. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Bethanasami Naidu .. *Appellant** (*Ctr.-petr. 6th Respt.*)

v.

Minor Kannan *alias* Sanjeevi Naidu and another .. *Respondents* (*Petrs.*).

Civil Procedure Code (V of 1908), sections 50, 52 and 53—Trespass committed—Suit against father—Decree passed—Partition effected before decree—Subsequent death of father—Property allotted to sons whether can be proceeded against.

Apart from section 53, Civil Procedure Code, there can be little doubt that if a decree is obtained against a father personally it cannot be executed against somebody who is a stranger to the suit. If he is to be made liable a separate suit must be filed. Where the suit is in respect of a trespass committed and the father alone is impleaded as party it cannot be said that the sons can be proceeded against in respect of the decree passed. But where it is shown that the father and his sons effected a division of the family properties during the pendency of the suit, the property in the hands of the son which fell to his share on partition will be liable under the Hindu Law for the payment of his father's debt in respect of which a decree has been passed. And if the father dies after the passing of the decree the property in the hands of the son after the partition can be proceeded against in execution under section 50 or section 52 of the Code.

*A. A. A. O. No. 10 of 1941. 25th November, 1942.

Venkatanarayana v. *Somaraju*, (1937) 2 M.L.J. 251 : I.L.R. (1937) Mad. 880 (F.B.) and *Nagireddi* v. *Somappa*, (1942) 2 M.L.J. 691 (F.B.), considered.

Firm Govindram Dwarkadas v. *Nathulal*, A.I.R. 1937 Nag. 45, not followed.

Appeal against the order of the Court of the Subordinate Judge of Dindigul, dated 9th April, 1940, and made in A. S. No. 62 of 1939, preferred against the order of the Court of the District Munsiff of Periyakulam in E. P. No. 395 of 1938, in O. S. No. 324 of 1921, District Munsiff's Court, Dindigul.

C. A. Seshagiri Sastri for Appellant.

T. P. Gopalakrishna Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—The respondent was the nearest agnate of one Muthukrishna. The deceased man left two sisters who, soon after his death, purported to lease the property of their brother to certain persons who were the third and fourth defendants in a suit brought by the respondent. Defendants 3 and 4 were not members of the same family ; but were impleaded as persons who had trespassed on the property under colour of a lease which the lessors had no power to grant. A decree was obtained against the third and fourth defendants. The present appellant is the son of the third defendant, who died in 1936 after the decree had been passed. Prior to the passing of the decree, however, the third defendant divided from his son, the appellant. The respondent now seeks to execute his decree against the appellant, although he was not a party to the original decree. The respondent contends that the appellant's father was sued in a representative capacity as the manager and father of the family. He also pleads that in any event, section 53, Civil Procedure Code would apply and so the property that came into the hands of the appellant upon partition is liable for his father's debt. The first Court found as a fact that the father of the appellant was sued in a representative capacity and held that the case was directly covered by the Full Bench decision of this Court in *Venkatanarayana* v. *Somaraju*[1]. The Subordinate Judge in appeal did not go into the question whether the father was sued in a representative capacity ; but he seemed to be of opinion—relying on some remarks in the judgments of Venkatasubba Rao and Venkataramana Rao, JJ., in the above Full Bench case—that that must be presumed. He also referred to the decision of Cornish, J., who while agreeing with Venkatasubba Rao and Venkataramana Rao, JJ. that the suit was filed against the father in a representative capacity, yet thought that even if that were not so, section 53 would make the son's share liable.

In the case considered by the Full Bench in *Venkatanarayana* v. *Somaraju*[1], the father had purchased the suit property on behalf of the family. The learned Judges found, after considering the history of this land, that the father had behaved in a representative capacity for many years and that it was extremely unlikely that he was not sued in the same representative capacity. In the present case, however, defendants 3 and 4 took a lease of the land from two ladies who they must have known had no right to the property. They were therefore trespassers. It is difficult to see how a joint family can commit a tort. Only persons can commit a trespass and they alone are liable for the tort committed by them. If the sons were joint trespassers, they would be liable as joint tortfeasors and could be made liable only by impleading them. Moreover, the persons who obtained leases from the sisters of the former owner of the land were not of the same family which itself indicates that the land was not taken possession of in the name of the family. Reference has been made to a dictum of Venkataramana Rao, J., in his judgment in the Full Bench case in *Venkatanarayana* v. *Somaraju*[1], which is said to be incorrect in view of the later Full Bench case in *Nagireddi* v. *Somappa*[2], but it is not necessary to say this ; for what Venkataramana Rao, J., said was,

" Where the suit relates to a joint family property and the person sued is either the father or the eldest member, the accredited head of the family, it must be presumed that he was sued as representing his family . . . . ."

1. (1937) 2 M.L.J. 251 : I.L.R (1937) Mad. 880 (F.B.).
2. (1942) 2 M.L.J. 691 (F.B.).

This suit, unlike in *Venkatanarayana* v. *Somaraju*[1] is not with regard to the joint family property of the third defendant. It relates to property belonging to the respondent, the members of the joint family merely having trespassed on it. So that, even if we accept the dictum of Venkataramana Rao, J. it would not operate in this case. I therefore conclude that *Venkatanarayana* v. *Somaraiu*[1], has no application to this case.

Apart from section 53, Civil Procedure Code, I think there can be little doubt that if a decree is obtained against a father personally, it cannot be executed against somebody who is a stranger to the suit. If he is to be made liable, a separate suit must be filed. That proposition is not seriously disputed by Mr. Gopalakrishna Ayyar, for the respondent. It was laid down as early as *Krishnaswami Konan* v. *Ramaswami Iyer*,[2] and has been recently affirmed by King, J. in *Rangaswami Goundan* v. *Kandaswami Goundan*[3].

There remains for consideration the effect of section 53, Civil Procedure Code. It runs,

> " For the purposes of section 50 and section 52, property in the hands of a son or other descendant which is liable under Hindu law for the payment of the debt of a deceased ancestor, in respect of which a decree has been passed, shall be deemed to be property of the deceased which has come to the hands of the son or other descendant as his legal representative."

There can be no doubt in this case that the property in the hands of the son which fell to his share on partition is liable under Hindu law for the payment of his father's debt in respect of which a decree has been passed. It would therefore follow from the legal fiction expressed in this section that the property is to be deemed to be the property of the deceased which has come into his hands as legal representative and so can be proceeded against in execution under section 50 or under section 52. In *Firm Govindram Dwarkadas* v. *Nathulal*[4], the opposite view was taken. The learned Judges say that,

> " The sons' share cannot be regarded as ' assets ' of the father for two reasons, (1) they constitute the sons' property and not the father's and (2) they do not share the nature of the property to which the sons succeed after their father's death. Section 53, Civil Procedure Code which is the only provision which can have any bearing on the issue, speaks of ' a deceased ancestor' and ' property of the deceased ' which has come to the hands of the sons and it cannot be stretched to apply to the property which the sons obtain on partition with their father."

It is true of course, that the property in the son's hands after partition was not the property of the deceased. Nor has it come into his hands as a legal representative ; but as Cornish, J. pointed out in the Full Bench decision, *Venkatanarayana* v. *Somaraju*[1], section 53 does not require that the property should be that of the deceased or should have come into the hands of the legal representative, but only says that property in the hands of the son liable for the father's debt should be deemed under this fiction to be property of the deceased which has come into the son's hands as his legal representative. He quotes Mr. Justice Cave in the *Queen* v. *Norfolk County Council*[5],

> " When you talk of a thing being deemed to be something, you do not mean to say that it is that which it is to be deemed to be. It is rather an admission that it is not what it is to be deemed to be, and that, notwithstanding it is not that particular thing, nevertheless, for the purposes of the Act, it is to be deemed to be that thing."

Cornish, J., refers to and criticises a Full Bench decision of the Patna High Court in *Atul Krishna Ray* v. *Lal Nandanji*[6] in which two of the learned Judges were of opinion that section 53 did not apply to cases where the son was divided, whereas the third Judge, Wort, J. held the opinion approved of by Cornish, J. I prefer for the above reasons to follow the decision of Cornish, J. and to give section 53, Civil Procedure Code its literal interpretation. As Cornish, J. remarked, it does not work any injustice ; for it merely lays down a procedure and enables the son's property to be proceeded against in execution instead of forcing the decree-holder to proceed to a separate suit.

The appeal is dismissed with costs.

B.V.V. *Appeal dismissed.*

---

1. (1937) 2 M.L.J. 251 : I.L.R. (1937) Mad. 880 (F.B.)
2. (1899) 9 M.L.J. 127 : I.L.R. 22 Mad. 519.
3. (1942) 2 M.L.J. 361.
4. A.I.R, 1937 Nag. 45.
5. (1891) 60 L.J.Q.B. 379.
6. (1935) I.L.R. 14 Pat. 732 (F.B.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

Alluri China Bapanna Garu and others .. *Appellants**

v.

Muthangi Jaggiah *alias* Jagga Rao Garu and another .. *Respondents.*

Civil Procedure Code (V of 1908), section 47—Applicability—Dispute between co-decree-holders—Judgment-debtor not interested therein—Appeal—Maintainability.

In order that section 47, Civil Procedure Code, may apply the contest must be between the opposing parties in the suit or their representatives in interest. Where the dispute is as between co-decree-holders in which the judgment-debtor has no concern the section has no application and no appeal will lie.

Anavarsada Khan Pani Sahib v. *Misiri Khan Pani Sahib*, (1916) 31 M.L.J. 44, and *Annamalai Mudali* v. *Ramaswami Mudali*, (1941) 1 M.L.J. 45 : I.L.R. (1941) Mad. 438 (F.B.), relied on.

Mangayya v. *Sriramulu*, (1913) 24 M.L.J. 477, disapproved.

Appeal against the order of the Court of the Subordinate Judge of Chittoor, dated 16th August, 1941 and made in E. A. No. 92 of 1941 in E. P. No. 75 of 1939 in O. S. No. 21 of 1931.

K. Venkatarama Raju and *S. Kothandarama Nainar* for Appellants.

V. S. Narasimhachar and *S. Narasinga Rao* for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—The first respondent has raised a preliminary objection. He says this appeal does not lie. We consider that this contention must be upheld. At the same time the Subordinate Judge has not followed a provision of law which he was bound to follow. In order to appreciate the situation and the directions which we propose to give in respect of future proceedings it is necessary to set out the facts.

On the 9th September, 1913, the first defendant executed a mortgage of immovable property in favour of the Rajah of Bhadrachallam to secure the sum of Rs. 1,16,650. This mortgage was assigned to three groups of creditors of the mortgagee. One group is now represented by the first respondent, the second group by appellants 6 and 7 and the third group by appellants 1 to 5. In O. S. No. 21 of 1931 of the Court of the Subordinate Judge of Chittoor a mortgage decree was passed in favour of the assignees of the mortgage. Appellants 1 to 5 collected from the mortgagor the sum of Rs. 46,000, which they allocated to what was due to them under the mortgage. This led the first respondent to file O. S. No. 17 of 1934 in the Court of the Subordinate Judge of Vellore for the recovery of three-fifths of this sum. All the assignees were parties to this suit. The trial Court held that the first respondent and the appellants 6 and 7 were entitled together to a 115/192 share of the amount collected and appellants 1 to 5 were entitled to the remainder. Appellants 1 to 5 appealed to this Court and their appeal was allowed. This Court held that the defendants were merely co-assignees with the plaintiff of the mortgage and co-assignees were not entitled to give a complete discharge to a mortgagor on behalf of the other co-assignees. If a co-assignee was found to have realised his own share of the mortgage debt, he could not be said to have been acting in the capacity of an agent or much less, of a constructive trustee and any receipt by him could not be considered to be a receipt on behalf of the others. Consequently the assignees who had collected Rs. 46,000 were not liable to account, the amount being less than what was due to them as their share of the mortgage.

A receiver was appointed in the mortgage suit and he collected the sum of Rs. 4,930-12-4, which he paid into Court. Subsequently the first respondent applied to the Court under the provisions of Order 21, rule 15, of the Civil Procedure Code for an order allowing him to execute the decree on behalf of himself and other decree-holders. This order was granted, but the Subordinate Judge did not follow the provisions contained in sub-rule (2) of rule 15. The sub-rule says that where the Court sees sufficient cause for allowing the decree to be executed by one decree-

*A. A. O. No. 27 of 1942. 8th December, 1942.

holder on behalf of himself and others on an application made under the rule, it shall make such order as it deems necessary for protecting the interests of the persons who have not joined in the application. The Subordinate Judge passed an order under sub-rule (1) unconditionally. Thereupon the first respondent applied to the Court for payment out to him of the Rs. 4,930-12-4. The order asked for was passed and the appeal is against that order.

The Court has been given to understand that since the passing of this order, a large portion of the decretal amount has been realised by the sale of the mortgaged properties and the proceeds have been deposited in Court.

In support of his contention that section 47 of the Civil Procedure Code does not apply here the learned advocate for the first respondent has relied on the decision of this Court in *Anavarsada Khan Pani Sahib* v. *Misiri Khan Pani Sahib*[1], where it was held that section 47 has no application where the dispute relates solely to the rights *inter se* of the judgment-debtors. and the decree-holder has no interest in their decision. In this case the dispute is between co-decree-holders. The same principle must apply. The learned advocate for the appellant says that the decision of this Court in *Mangayya* v. *Sriramulu*[2], should be preferred. It was there held that the expression "between parties to suit" in section 47, though it no doubt imports "between parties opposed to each other," does not necessarily mean between the parties who are plaintiff and defendant respectively in the suit. This decision cannot be followed. The question now under discussion was settled by the Full Bench of this Court which decided *Annamalai v. Ramaswami*[3]. The effect of the Full Bench decision was to confirm the opinion expressed in *Anavarsada Khan Pani Sahib* v. *Misiri Khan Pani Sahib*[1], In order for section 47 to apply, the contest must be between the opposing parties in the suit or their representatives in interest. In the present case the dispute is merely between co-decree-holders in which the judgment-debtor has no concern. Therefore section 47 does not apply.

Our judgment, however, will not preclude the appellants applying to the Subordinate Judge to pass a further order, which complies with Order 21, rule 15 (2); and it is especially necessary that there should be such an order in view of the fact that there is now lying in Court a very large sum.

The appeal having failed must be dismissed with costs in favour of the first respondent.

B.V.V. *Appeal dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE LAKSHMANA RAO AND MR. JUSTICE KRISHNASWAMI AYYANGAR.

Kamjula Subbarama Reddi and another .. *Appellants** (*Defendants* 1 *and* 3)

v.

Mangamuri Subba Reddi and others .. *Respondents* (*Plff and defts.* 4 *and* 2).

Registration Act (XVI of 1908), section 32—Will—Presentation for registration by natural father of minor widow—Validity.

Where there was no male agnate of the deceased husband of a minor widow capable of being appointed guardian, but the proper person to be appointed legal guardian of the minor and the proper person to act as the natural guardian in the absence of a judicial appointment was the father of the minor girl, he is a "representative" within the meaning of section 32, of the Registration Act, and entitled to present the will of her husband for registration. The Registrar is the judge of whether the person presenting the document is entitled to do so.

Venkatappayya v. *Venkata Ranga Rao*, (1928) 56 M.L.J. 218 : L.R. 56 I.A. 21 : I.L.R. 52 Mad. 175 (P.C.), followed.

Padmavathi v. *Shrinivasa Kamathi*, (1921) 14 L.W. 575 : 26 C.W.N. 369 (P.C.), distinguished.

Appeal under Clause 15 of the Letters Patent against the order of Somayya, J., dated 14th October, 1941, and made in S. A. No. 7 of 1940 on the file of the High

---

1. (1916) 31 M.L.J. 44.
2. (1913) 24 M.L.J. 477.
3. (1941) 1 M.L.J. 45 : I.L.R (1941) Mad. 438 (F.B.).

*L. P. A. No. 3 of 1942. 11th January, 1943.

Court preferred against the decree of the District Court of Nellore in A. S. No. 63 of 1939, preferred against the decree of the Court of the District Munsiff of Kanigiri in O. S. No. 837 of 1937.

K. Umamaheswaram for Appellants.

G. Venkatarama Sastri for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—The broad question in this appeal is whether the judgment of the Privy Council in *Venkatappayya* v. *Venkata Ranga Rao*[1], has stated a rule different from that stated in *Padmavathi* v. *Shrinivasa Kamathi*[2], with regard to the presentation of documents for registration under the Indian Registration Act, 1908. Before discussing these judgments and the judgments in the other cases quoted in the course of the arguments, we will state the relevant facts.

One Rami Reddi died on the 12th December, 1913. He was survived by his widow, Subbamma, who was then a minor. By a will executed on the day before his death, Rami Reddi bequeathed to her two-thirds of his estate and one-third to his sister's son who is the fourth defendant in this suit. The will was registered on the 20th January, 1914, having been presented for registration by Venkatasubba Reddi, the father of Subbamma. Subbamma died in the year 1934, leaving a will dated the 20th June, 1934. By this will she left to her brothers (defendants 1 to 3, who are the appellants) the whole of her properties. The suit was filed by the first respondent. He is the son of Rami Reddi's brother, Linga Reddi. When Rami Reddi died, the first respondent was only five years of age and was the only surviving agnate of Rami Reddi. The first respondent claimed to be entitled to the properties left by Rami Reddi on the ground that the will executed by him was not a genuine document. It purported to be attested by four witnesses. Three of these persons were dead when the suit was heard and the fourth was not called to give evidence. The only witness who was called to prove the will was the writer, but he was not an attesting witness. In these circumstances the District Munsiff held that the appellants had not proved the will and consequently decreed the suit. The District Munsiff was under the impression that the law then, as now, requires, the will of a Hindu to be attested. The District Judge concurred in this opinion.

The appellants appealed to this Court. The appeal was heard by Somayya, J., who rightly held that the law in 1913 did not require a will of a Hindu to be attested and that therefore the decisions of the lower Courts had proceeded on a wrong basis. The learned Judge remanded the case to the District Judge to be decided in the light of his judgment. The appellants asked to be allowed on the remand to put in evidence, under the provisions of section 33 of the Evidence Act, the depositions of three of the attesting witnesses recorded by the Sub-Registrar when the will was registered. Somayya, J., held that they were not entitled to do this. He considered that he was bound by the decision of this Court in *Narayana Reddi* v. *Audilakshmi Ammal*[3], which was based on the judgment of the Judicial Committee in *Padmavathi* v. *Shrinivasa Kamathi*[2], and that the decision of the Board in the later case of *Venkatappayya* v. *Venkata Ranga Rao*[1] had stopped short of laying down a different rule.

Section 32 of the Registration Act requires documents presented for registration to be presented (*a*) by a person executing or claiming under it or (*b*) the representative or assign of such person or (*c*) by an agent duly authorised by power-of-attorney executed and authenticated in the manner required by section 33. Section 2 (10) states that the word "representative" includes the guardian of a minor. Part VIII of the Act deals with the presenting of wills and authorities to adopt. There are two sections in this part—sections 40 and 41. Section 40 (1) says that the testator, or after his death a person claiming as executor or otherwise under a will may present it for registration. Sub-section (2) says that the donor, or after his death, the donee of an authority to adopt, or the adoptive son, may present it.

---

1. (1928) 56 M.L.J. 218 : L.R. 56 I.A. 21 : I.L.R. 52 Mad. 175 (P.C.).
2. (1921) 14 L.W. 575 : 26 C.W.N. 369 (P.C.).
3. (1928) 55 M.L.J. 102 : I.L.R. 51 Mad. 462.

Sub-section (1) of section 41 states that a will or an authority to adopt, presented for registration may be registered in the same manner as any other document, and sub-section (2) says,

> " A will or authority to adopt presented for registration by any other person entitled to present it shall be registered if the registering officer is satisfied—
> (a) that the will or authority was executed by the testator or donor, as the case may be ;
> (b) that the testator or donor is dead ; and
> (c) that the person presenting the will or authority is, under section 40, entitled to present the same."

In *Padmavathi* v. *Shrinivasa Kamathi*[1], the facts were these. One Krishna Kamathi executed deeds of gift in favour of his daughter-in-law. The deeds were presented for registration by the natural father of the donee who was a minor. The question was whether the registration was lawful. The Privy Council held that it was not. Delivering the judgment of the Board Lord Atkinson said,

> " Their Lordships are clearly of opinion that as the appellant was not only a minor, but a married woman, her father had ceased to be her natural guardian, and had never been appointed her legal guardian, and was not therefore her assignee or representative within the meaning of section 3 of the Registration Act, 1877. He was not an executant of the said deeds or either of them ; neither was, within the meaning of section 34 of that Act, the representative, assign or agent duly authorised on the behalf of Krishna Kamathi, deceased, the only executant. The presentation by him of the two deeds for registration was in direct conflict with the express provisions of this 34th section. The deeds were consequently never legally registered. The registration of them which was procured was illegal, invalid and a nullity."

In considering these observations it must be remembered that the donee's husband was alive and was in law her guardian.

The judgment of the Privy Council in *Venkatappayya* v. *Venkata Ranga Rao*[2], was in an appeal from a judgment of this Court, *Venkatappayya* v. *Venkata Ranga Rao*[3]. There a husband by will gave authority to his widow to adopt. She exercised the authority and subsequently the natural father of the minor presented the will for registration. This Court held that the presentation was lawful. The decision was upheld by the Privy Council in *Venkatappayya* v. *Venkta Ranga Rao*[2], and in delivering the judgment of the Board Lord Phillimore made these observations,

> " Then given the principals, section 32 introduces certain agents who can take the place of principals, and one of these agents is the representative of a person claiming under the document. Now the word representative is defined in section 3 (the corresponding section in the Registration Act of 1877 to section 2 of the present Act) as including the guardian of a minor. Here the person presenting describes himself as being the natural father and guardian. It is said that when adoption has once taken place, the adopted child is removed wholly out of his natural family and that his natural father has no longer a legal relation to him. This may be taken to be the case ; but what is to happen when a child of tender years, as was the case here, is actually residing with his natural father, and has no appointed guardian. When one remembers that the definition of representative does not make it equal to guardian, but says that it includes guardian, might it not well be said that in these circumstances and in the absence of any legally appointed guardian, the natural father was the representative ?"

After observing that it was not necessary to decide this question, Lord Phillimore proceeded to say,

> " It appears that as so often happens, the adoption was of a child, of the same family, and that if the child be taken as having entered into his adoptive father's family, the natural father was nevertheless the nearest male agnate, and the proper person to be appointed guardian, and the proper person to act as natural guardian in the absence of any judicial appointment. If there were any doubt upon these facts, it might further be observed that, by section 41, the Registrar is made the judge whether the person presenting the authority is entitled to present it, and though objection was raised on behalf of the appellant to the registration on the ground that it was out of time, no similar objection was raised as to the propriety of the person presenting."

This judgment goes to the full length suggested by the appellants. The report shows that the decision of the Board in *Padmavathi* v. *Shrinivasa Kamathi*[1] was discussed in the course of the arguments ; and although the question asked in the first of the passages quoted was not answered there is indication that the Judicial Committee were inclined to an affirmative answer. The second passage quoted however, is the more important. It is to the effect that where the natural father is the nearest

---

1. (1921) 14 L.W. 575 : 26 C.W.N. 369 I.L.R. 52 Mad. 175 (P.C.). (P.C.).
2. (1928) 56 M.L.J. 218 : L.R. 56 I.A. 21 :
3. (1919) 38 M.L.J. 149: I.L.R. 43 M. 288.

male agnate and the proper person to be appointed the guardian of the minor and the proper person to act as the natural guardian in the absence of a judicial appointment he is a representative within the meaning of section 32 and entitled to present the document for registration. Their Lordships also indicate that the Registrar is the judge of whether the person presenting the document is entitled to do so.

We consider that the present case is governed by the decision in *Venkatappayya* v. *Venkata Ranga Rao*[1]. Here as there, there was no legal guardian. There, the father was the nearest male agnate, and here there was no male agnate capable of being appointed guardian, but the proper person to be appointed the legal guardian and the proper person to act as the natural guardian in the absence of a judicial appointment was the father of Subbamma, who presented the will for registration. Moreover, no objection to the presentation was taken before the Registrar. It appears to us that the factors which weighed with the Privy Council in *Venkatappayya* v. *Venkata Ranga Rao*[1], are present here. The important distinction between that case and *Padmavathi* v. *Shrinivasa Kamathi*[2] is that in the latter case there was a lawful guardian and the presentation was not made by him.

For the reason given, we hold that the registration of the will of Rami Reddi was lawful and that the District Judge, when he comes to consider the case further, must take into consideration the depositions which were recorded before the Registrar at the inquiry under section 41 of the Registration Act.

The appellants have succeeded and are entitled to their costs against the first respondent.

K.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :— SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

P. V. Ramalinga Chetti .. *Appellant** (*Plaintiff*).

v.

Petha Goundan and others .. *Respondents* (*Defendants*)

Madras Debt Conciliation Act (XI of 1936), sections 10 (2) (3), 19 and 25—Suit on mortgage—Application by debtor under section 10 (1)—Creditor required to file statement—Non-compliance—Debt declared to be discharged—Application for revival—Dismissal—Suit on mortgage whether can be proceeded with.

On 6th December, 1922, the respondents, who were brothers and constituted an undivided Hindu family, executed a mortgage in favour of the appellant for a certain sum, the debt being repayable within five years. On the 6th December, 1939, the appellant filed a suit to enforce the mortgage. On the 6th June, 1940, the 1st respondent who was the manager of the family applied to the Debt Conciliation Board for settlement of his debts, but the only debt due was that in favour of the appellant. The Board directed notice to issue to the appellant under section 10 (1) of the Debt Conciliation Act and he was duly served but he failed to file the statement and thereupon the Board passed an order under sub-section (2) cancelling the debt. Later on the appellant applied to the District Munsiff in whose Court the mortgage suit was pending for an order under sub-section (3) reviving the debt but the application was dismissed as being out of time. The mortgage suit was also dismissed on the same date. It was contended that the order under section 10 (2) of the Act did not preclude the Court from proceeding with the mortgage suit.

Held, that the effect of the order under sub-section (2) of section 10 of the Act was that the debt was discharged for all purposes and all occasions, and that the Court rightly dismissed the suit on the mortgage after the application for revival of the debt was dismissed.

Appeal against the decree of the District Court of Salem in A. S. No. 324 of 1940, preferred against the decree of the Court of the District Munsiff of Dharmapuri in O. S. No. 332 of 1939.

D. Ramaswami Aiyangar for Appellant.

B. V. Viswanatha Aiyar for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—This appeal raises a question with regard to the effect of section 19 of the Madras Debt Conciliation Act, 1936. On the 6th December, 1922,

1. (1928) 56 M.L.J. 218 : L.R. 56 I.A. 21 : I.L.R. 52 Mad. 175 (P.C.).
2. (1921) 14 L.W. 575 : 26 C.W.N. 369 (P.C.).

*S. A. No. 231 of 1942. 15th December, 1942.

the respondents, who are brothers and constitute an undivided Hindu family, executed a mortgage in favour of the appellant to secure the sum of Rs. 600, the debt to be repaid within five years. On the 6th December, 1939, the appellant filed a suit to enforce the mortgage. On the 6th June, 1940, the first respondent, who is the eldest member and therefore the manager of the family applied to the Debt Conciliation Board of Dharmapuri for the settlement of his debts. The Court has been told that the only debt due by the estate was the debt due to the appellant. The Board directed notice to issue to the appellant under section 10 (1) of the Act. He was duly served but he failed to file the statement required by that sub-section. Consequently, on the 5th May, 1940, the Board passed an order under sub-section (2) cancelling the debt. The sub-section says that subject to the provisions of sub-section (3) a debt of which a statement is not submitted to the Board in compliance with the provisions of sub-section (1) shall be deemed "for all purposes and all occasions to have been duly discharged." Sub-section (3) allows a creditor to apply to the Board or a Civil Court to revive the debt and the Board or the Civil Court can pass such an order if it is satisfied that the creditor had no knowledge of the publication of the notice or that for some other sufficient reason he was unable to submit the statement. The time allowed for an application under sub-section (3) is two months after the creditor became aware of the proceedings taken under the section. The appellant applied under sub-section (3) to the District Munsiff of Dharmapuri, in whose Court the mortgage suit was filed, for an order under sub-section (3), but the application was filed out of time and therefore was dismissed. The same day the District Munsiff dismissed the appellant's suit. The decision of the District Munsiff was concurred in by the District Judge of Salem on appeal. The present appeal is from the decision of the District Judge.

It is not disputed that the Debt Conciliation Board had power in the circumstances to pass an order under sub-section (2) of section 10, but it is said that the fact that it did pass such an order did not preclude the District Munsiff from proceeding with the suit. It is said that the effect of section 19 is only to bar the institution of a suit during the pendency of an application before a Debt Conciliation Board and does not apply to a case where a suit has been instituted before the application to the Board. So far as is relevant to this case the section says that no Civil Court shall entertain a suit in respect of the recovery of a debt which has been deemed to have been duly discharged under sub-section (2) of section 10, except a debt which is revived under sub-section (3) of that section. Emphasis is laid on the word "entertain." Assuming that this word should be given the meaning suggested by the learned advocate for the appellant, this would not help his client. Section 25 says that when an application has been made to a Board under section 4, a suit or other proceedings then pending before a Civil Court in respect of a debt for the settlement of which application has been made shall not be proceeded with until the Board has dismissed the application. Therefore when the application for the conciliation of the debt was made by the first respondent the suit could not be proceeded with until the Board had dismissed the application. Section 17 requires the Board to dismiss an application if no amicable settlement is arrived at within twelve months from the date of the application. When an application is dismissed the Court, can, of course, proceed with the suit, but then it must have regard to an order passed under sub-section (2) of section 10. That sub-section is very emphatic. When there is an order under it the debt is discharged for all purposes and all occasions.

The learned advocate for the appellant says that the dismissal of the suit was wrong so far as it concerned respondents 2 to 5. This question was not raised in the Courts below, nor was it raised in the memorandum of appeal to this Court. We hold that this question cannot be raised now. It is a mere after-thought and to allow it to be raised would mean remanding the suit to the trial Court to take further evidence. The respondents maintain that the application was made by the first respondent on behalf of the joint family of which he was the manager.

For the reasons indicated the appeal will be dismissed with costs.

B.V.V. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AY MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Nalluswami Reddi .. *Petitioner** (*Complainant*)

v.

Nallammal .. *Respondent* (*D. W.* 1).

Criminal Procedure—Subordinate Court—Power to review its own judgment—Limits.

On a charge of theft it was found in appeal by the Joint Magistrate that the accused acted in good faith believing that the property belonged to the wife of the complainant. The property was however, ordered to be returned to the complainant. Subsequently the wife applied for the return of the property to her on the ground that it was her property. The Joint Magistrate without giving notice to the complainant set aside his previous order and directed the property to be restored to the wife. In a petition to the High Court to set aside that order,

Held, that the Joint Magistrate acted improperly and illegally in reviewing his first order.

No Court subordinate to the High Court has any inherent jurisdiction to review its own judgment save in a few circumstances such as where there has been abuse of the process of Court, or fraud played upon the Court, or where petty clerical errors or mistakes have been made.

Petition praying that in the circumstances stated therein the High Court will be pleased to set aside the order dated 16th May, 1942, in M. C. No. 32 of 1942, on the file of the Court of the Joint Magistrate, Karur, and direct that the material objects be delivered to the petitioner.

Y. Chenthamaraikannan for Petitioner.

G. Gopalaswami for Respondents.

K. V. Chari for the Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—The petitioner laid a complaint of house-breaking and theft against his brothers-in-law and a man who is said to have enticed away his wife. The Stationary Sub-Magistrate of Kulitalai found all the three accused guilty and, sentenced them to various fines and ordered the property to be restored to P. W. 1. In appeal, the Joint Magistrate of Karur, while not disagreeing with the Sub-Magistrate's finding that the accused had removed the property in question, thought that they had done so in good faith believing that the property belonged to the wife of the complainant. He therefore allowed the appeal and set aside the conviction ; but he made no fresh order as to the disposal of the property. The Stationary Sub-Magistrate, on a motion of the complainant, made a reference to the Joint Magistrate asking him for orders as to the disposal of the property ; and the reply of the Joint Magistrate was that the property should be restored to the complainant as ordered by the Sub-Magistrate. Subsequently, the wife of P. W. 1 applied to the Joint Magistrate asking him to return the property to her on the ground that it was her property. The Joint Magistrate, without giving notice, to P. W. 1, set aside his own previous order and directed the property to be restored to the wife of P. W. 1.

It is contended here in this petition that the Joint Magistrate acted without jurisdiction in reviewing his own previous order and that in any event the property should have been restored to P. W. 1.

The Joint Magistrate certainly acted improperly—and I think illegally—in reviewing his first order. No Court subordinate to the High Court has any inherent jurisdiction to review its own judgment save in a few circumstances such as where there has been abuse of the process of Court, or fraud played upon the Court, or where petty clerical errors or mistakes have been made.

Whether the wife of P. W. 1 is really entitled to this property, as she says, or whether it belongs to P. W. 1, as he contends, cannot be satisfactorily decided by a Criminal Court ; but where property is taken by violence by one person under the colour of a civil claim, I think the Criminal Court should ordinarily order the property so taken by violence to be returned to the person from whom it was taken ; otherwise, Criminal Courts would be encouraging persons to take the law into their own hands, break into other person's houses, and take property from them under colour of a right which they might not in fact possess.

---

*Crl. M. P. No. 331 of 1942. 10th July, 1942.

The order of the Joint Magistrate is therefore set aside and the property ordered to be restored to P. W. 1. If his wife or any one of the accused has any right to the property, that right must be established in a Civil Court.

K. S. ——— *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BYERS.

Raja Jagaveera Rama Muthu Kumara Venkateswara Ettappa Naicker Ayyan Avergal, Zamindar of Ettayapuram .. *Petitioner* (Petitioner).*

Land Acquisition Act (I of 1894), sections 9 (2), 18, 19 and 25 (1)—Claim of compensation—Original claim at a certain rate—Subsequent claim at lesser rate—Still later claim at old rate—Amendment of claim superfluous—Power in the Judge to grant or refuse.

Where the petitioner had in his claim under section 9 (2) of the Land Acquisition Act asked for compensation at a higher rate than he had asked subsequently at the time of the reference to the Subordinate Judge, and his petition to amend his claim later on for award of compensation at the original rate he claimed was dismissed by the Court as not within its jurisdiction to receive,

Held, that it was open to the Subordinate Judge to award compensation at the original rate claimed under section 9 (2) of the Act or to dismiss the claim entirely and that the amendment was clearly unnecessary.

Revenue Divisional Officer, Vizagapatam v. *Zemindar of Chemudu,* I.L.R. (1938) Mad. 479 and *Mt. Bhagwati* v. *Mt. Ramkali,* (1939) 2 M.L.J. 98 : 66 I.A. 145 : I.L.R. (1939) Karachi 299 (P.C.). referred to.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge of Tinnevelly dated 26th October, 1942 and made in I. A. No. 602 of 1942 in L.A.C. No. 5 of 1941.

T. V. Muthukrishna Aiyar and *A. Swaminatha Aiyar* for Petitioner.

The Court delivered the following

JUDGMENT.—The petitioner has been awarded compensation under section 11 of the Land Acquisition Act and on his application under section 18 of the Act, a reference has been made to the Court of the Subordinate Judge of Tinnevelly. At the time he asked for a reference under section 18 the petitioner claimed compensation at the rate of eight annas per square foot, although he had in his claim under section 9 (2) of the Act demanded compensation at the rate of twelve annas per square foot. After the case had been referred to the Subordinate Judge by the Collector under section 19 of the Act, the petitioner filed a superfluous statement before the Subordinate Judge in which he reiterated his claim to compensation at the rate of eight annas per square foot. Subsequently, in consequence of something which had happened in another Land Acquisition case relating to some land in the neighbourhood, the petitioner desired to enhance his claim from the eight annas specified by him to the twelve annas per square foot originally claimed under section 9 (2) before the Collector. He accordingly put in an application to amend his claim and this was refused for two reasons by the learned Subordinate Judge. The first reason was that he had no jurisdiction to allow an amendment of the claim and that in any event the application was made at a very late stage and was devoid of any *bona fides.* The petitioner has now come up in revision and Mr. T. V. Muthukrishna Ayyar, his learned advocate, relies on two decisions. The first of them is the case of *Mt. Bhagwati* v. *Mt. Ramkali*[1], in which it was laid down that the word "grounds" referred to in clause (2) of section 18 of the Land Acquisition Act does not mean a statement of claim or particulars on which the application is made but merely refers to one or more of the four grounds referred to in clause (1) of the section. The other case is that of the *Revenue Divisional Officer, Vizagapatam* v. *Zamindar of Chemudu*[2], in which it was held that,

"although section 18 (2) of the Land Acquisition Act requires that the application for a reference to a Court shall state the grounds on which the objection is taken, there is a sufficient compliance with

*C. R. P. No. 1620 of 1942. 26th November, 1942.

1. (1939) 2 M.L.J. 98 : 66 I A. 145 ; I.L.R. (1939) Karachi 299 (P.C.),
2. I.L.R. (1938) Mad. 479.

its provisions if the application states on which of the four heads of objection detailed in the sub-section (1) the applicant proposed to rely. When an objection to the amount of compensation has been taken, the Court has jurisdiction to work out the amount of compensation in a manner and on a basis different from that which has been adopted either in the statement of claim before the Land Acquisition Officer or in the objections against the award."

It is clear from these two decisions that not only the amended statement which the petitioner wished to file but also the statements which he filed before the Collector and the Subordinate Judge immediately after claiming a reference under section 18 were all superfluous. All that he had to do was to state in his application that he objected to the amount of compensation awarded and it was not incumbent upon him to state whether he claimed compensation at the rate of twelve annas as originally demanded by him or whether he limited it to some lesser amount. The maximum and minimum which can be awarded by the Subordinate Judge are clearly indicated in section 25 (1) of the Act, and, therefore, without any particulars of claim by him, it is open to the Subordinate Judge to award him compensation at the rate of twelve annas per square foot as originally claimed by him under section 9 (2) of the Act or to dismiss his claim entirely. The Subordinate Judge is not limited in framing his award to any figures mentioned by the petitioner in his application under section 18 of the Act. In view of this the amendment is clearly unnecessary and this petition is ordered to be dismissed.

K.C. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Avvari Subba Row and others .. *Appellants** (*Petrs.-Defts.*).

v.

Kondamudi Varadaiah (deceased) and others.. *Respondents* (*Respts.-Plffs. and nil*).

Transfer of Property Act (IV of 1882), section 55 (2) (4)—Vendee of mortgage property—Undertaking to pay off mortgage—Madras Agriculturists' Relief Act coming into force meanwhile—Benefit of reduction in the debt—Who is entitled vendee or vendor—Claim of interest on the amount—When valid.

The appellants purchased immovable properties for a certain amount from the respondents, of which sum, a certain portion was left with the appellants to be paid for principal and interest due on a subsisting mortgage on the property. The balance was adjusted towards debts due from respondents to appellants. The Madras Agriculturists' Relief Act having come into force in the meantime, the respondents issued a notice to the appellants requiring them not to pay the amount to the mortgagee but to pay it with interest to themselves in order that they might pay off the amount directly to the mortgagee after scaling down the debt. But the appellants refused to comply with the demand claiming that they themselves being agriculturists, were entitled to the benefit of the Act by which they were entitled to the reduction of the debt by scaling down,

Held, that as the sale was in the present case intended to be free from encumbrances, the sum left with the appellants for paying off the mortgagee was part of the purchase money which was left for the specific purpose of paying off the mortgage on behalf of the respondents who were bound to discharge that encumbrance and therefore the appellants should return the unexpended balance which as a result of the statutory reduction of the debt, it was subsequently found unnecessary to pay to the mortgagee.

Naima Khatun v. *Sardar Basant Singh*, (1933) I.L.R. 56 All. 766 (F.B.), not approved.

Izzat—Un-nissa Begum v. *Partab Singh*, (1909) 19 M.L.J. 682 : L.R. 26 I A. 203 : I.L.R. 31 All. 583 at 589 (P.C.), referred to.

Held further, that there was no legal basis for the respondents' claim to interest till Act IV of 1938 came into force on the amount reserved with the vendee for payment to the mortgagee, the respondents having benefited by reason of the Agriculturists' Relief Act coming into force, though the position thereafter might be different if the appellants had without cause delayed payment to the mortgagee.

Appeal against the decree of the Court of the Subordinate Judge of Bapatla, dated 16th December, 1939, and passed in O. S. No. 36 of 1938, etc.

V. Rangachari for Appellants.

V. Govindarajachari for Respondents.

The Judgment of the Court was delivered by

Patanjali Sastri, J.—The appellants who were defendants in the Court below purchased certain immovable properties from the respondents (plaintiffs) for Rs. 11,000 on 10th August, 1934. Some of the properties had been mortgaged

---

*App. No. 347 of 1940 and C. M. P. No. 3284 of 1942. 4th December, 1942.

to one Venkatappayya to whom a sum of Rs. 5,682-7-0 was found to be payable for principal and interest on the date of the sale. This sum was left in the hands of the appellants for payment to the mortgagee and the balance of the purchase money was adjusted towards the debts due from the vendors to the appellants. The appellants, however, did not pay off the mortgage debt as provided in the sale deed. The Madras Agriculturists' Relief Act having been passed in March, 1938, the respondents who are agriculturists within the meaning of that Act issued a notice to the appellants in April, 1938, requiring them not to pay the amount reserved in their hands to the mortgagee, but to pay it with interest as provided in the mortgage bond to the respondents themselves in order that they might pay off the debt after getting it scaled down in accordance with the provisions of the Act. The appellants refused to comply with this demand, claiming that they were also agriculturists and as such were entitled to the benefit of the statutory reduction of the debt which they had undertaken to pay under the terms of the sale deed. Thereupon the respondents brought the suit out of which this appeal arises for directing the appellants to deposit the sum of Rs. 5,682-7-0 left in their hands at the time of the sale, together with Rs. 2,405-9-0 representing interest on the said sum from the date of sale at the rate provided in the mortgage with subsequent interest and costs, and for paying out of the amount thus deposited the sum properly payable to the mortgagee on scaling down the debt and the balance to the respondents as the persons entitled thereto. It may be mentioned here that the mortgagee himself brought a suit (O. S. No. 19 of 1939) to enforce the mortgage, and the two suits were tried together by the Court below which has passed a mortgage decree for Rs. 4,617 in the mortgagee's suit and a decree in favour of the respondents herein for the sum claimed with interest at six per cent. per annum from the date of suit till date of payment with costs, with a direction that the amount decreed in the mortgagee's suit if deposited by the appellants should be adjusted *pro tanto* towards this decree and that if such amount was not deposited by the appellants or realised in execution of the mortgage decree, the respondents should take out execution of this decree, and, after paying to the mortgagee out of the amount realised the sum declared due, appropriate the balance in satisfaction of the decree herein.

The main dispute in the appeal relates to the question as to who is entitled to the benefit of the statutory reduction of the mortgage debt —the mortgagors or the purchasers of the hypotheca. Mr. Rangachari for the appellants contended that the latter, having purchased the property subject to the mortgage, came under a liability to pay off the debt and that such liability being a "debt" within the meaning of the Act as held in *Perianna* v. *Sellappa*[1], and the appellants being agriculturists, they were entitled to the benefit of the scaling down of the debt, the vendors (mortgagors) having no more than a right to be indemnified against any claims of the mortgagee. Mr. Govindarajachari on the other hand argued for the respondents that the sale as between the vendors and the vendees having been free from encumbrances it was the duty of the vendors to discharge the mortgage in question, and that the amount left in the hands of the vendees for payment to the mortgagee was part of the purchase money which the vendees were directed to pay on their behalf, so that if the debt was subsequently reduced to any extent the benefit of such reduction should go to the vendors to whom the vendees should account for the unpaid balance. The dispute thus turns on the distinction between a sale subject to encumbrances and a sale free from encumbrances which under the Transfer of Property Act have different incidents attached to them as regards encumbrances existing on the property at the time of the sale. So far as the mortgagee is concerned, the respondents as mortgagors and the appellants as purchasers of the hypotheca are both entitled, as agriculturists, to have the debt scaled down in accordance with the provisions of the Madras Agriculturists' Relief Act, and the Act has no bearing on the question as to who is to have the benefit of the scaling down in such circumstances. Before turning to the sale deed on the proper cons-

1. (1938) 2 M.L.J. 1068 : I L.R. (1939) Mad. 218.

truction of which the decision must rest, it will be convenient here to refer to the relevant provisions of the Transfer of Property Act. Section 55 so far as it is material, provides—

"In the absence of a contract to the contrary, the buyer and the seller of immovable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following, or such of them as are applicable to the property sold :

(1) The seller is bound * * * * *

(g) to pay all public charges and rent accrued due in respect of the property upto the date of the sale, the interest on all incumbrances on such property due on such date, and, except where the property is sold subject to incumbrances, to discharge all incumbrances on the property then existing; * * *

(5) The buyer is bound * * * * *

(b) to pay or tender, at the time and place of completing the sale, the purchase money to the seller or such person as he directs ; provided that, where the property is sold free from encumbrances, the buyer may retain out of the purchase money the amount of any incumbrances on the property existing at the date of the sale, and shall pay the amount so retained to the persons entitled thereto ;

* * * * * * *

(d) Where the ownership of the property has passed to the buyer, as between himself and the seller, to pay all public charges and rent which may become payable in respect of the property, the principal monies due on any incumbrances subject to which the property is sold, and the interest thereon afterwards accruing due."

It will be seen that the rights and liabilities of the buyer and seller in regard to incumbrances on the properties sold are markedly different according as the property is sold subject to incumbrances or free from incumbrances as between the vendor and the vendee. In the one case the vendor is liable to pay only the interest on the incumbrances till the date of the sale and the vendee becomes liable to pay the principal due on the incumbrances as well as the interest thereon accruing after the sale. In the other the duty of discharging all incumbrances existing on the property on the date of the sale is laid on the seller who receives the full value of the property as its price. But as the buyer is interested in the discharge of such incumbrances as he has bargained for a clear title, he is given the right to retain out of the purchase money the amount of the incumbrances on the property for payment to the persons entitled thereto. These provisions make it plain that on the sale of property subject to incumbrances, the bargain relates to the vendor's interest in the property such as it is, that is to say, his equity of redemption, and the discharge of the incumbrances is the sole concern of the purchaser as between himself and the vendor who is only entitled to be indemnified against the incumbrances ; while in the case of a sale free from incumbrances, the price is fixed with reference to the full value of the property, the liability to discharge all the incumbrances being thrown on the vendor, the vendee however being given the right to retain out of the price an amount sufficient to clear the incumbrances. But as the liability to pay them off is that of the vendor who has to implement his sale by providing a clear title, the vendee must be regarded as paying the amount retained to the incumbrancer on behalf of the vendor out of the purchase money payable to the latter under the contract of sale. In other words, the vendee acts as the agent of the vendor as regards the disposal of the sum retained, although the agency is one which cannot be revoked as the vendee has himself an interest in the money being applied in the manner indicated. (*See* section 202 of the Indian Contract Act). If this is the position, as we apprehend it is, where immovable property is sold free from incumbrances, it follows that the vendor is entitled to call upon the buyer to account to him for any portion of the purchase money which it has become no longer necessary to apply in accordance with the stipulation in that behalf. We do not think that the observations of the Privy Council in *Izzat-Un-nissa Begam* v. *Partab Singh*[1], to which our attention was called by Mr. Rangachari are opposed to this view. Their Lordships were dealing with a case of sale of property subject to incumbrances and the observations which are expressly made with reference to such a transaction should not be taken as laying down the rights and liabilities of the parties to a sale free from incumbrances (*see* the observations on that decision in *Raghunatha* v. *Sadagopa*[2].

1. (1909) 19 M.L.J. 682 : L.R. 26 I.A. 203 : I.L.R. 31 All. 583 at 589 (P.C.).

2. (1911) 21 M.L.J. 983 : I.L.R. 36 Mad. 348.

The question accordingly arises as to whether the sale to the appellants was free from incumbrances or subject to incumbrances. The sale deed, Ex. A, recites that the property mentioned in the schedules *A* and *B* annexed thereto " has been sold to you, this day, after settling the price therefor, for Rs. 11,000. The said sale amount has been received in the following manner." It then refers to the mortgage in favour of Venkatappayya and the various payments made by the vendors towards the debt and states that after deducting those payments a sum of Rs. 5,682-7-0 was the balance due to the mortgagee on the date. Then occurs the following clause which was the subject of considerable discussion before us—

" By way of your having agreed to pay to the mortgagee, without our having any concern with the same, the said sum together with interest that may accrue in the future according to the terms of the mortgage and get the property released from the mortgage, the said sum of Rs. 5,682-7-0 has been received by us."

And after referring to the adjustment of the balance of Rs. 5,317-9-0 towards the debt due to the vendees under a compromise decree, it concludes by stating—

" Therefore the consideration amount of Rs. 11,000(in words rupees eleven thousand) relating to this deed, has been fully received by us in the aforesaid manner. Therefore, giving up all the rights belonging to us in the said property sold, we have delivered possession of the said property to you this day itself."

It may be mentioned here that the sale comprised all the properties mortgaged to Venkatappayya and the vendors had no interest thereafter in any part of the hypotheca. It was argued by Mr. Rangachari that this circumstance taken along with the clause relating to the receipt of Rs. 5,682-7-0 indicated that the sale was one subject to the mortgage, as the vendors had nothing further to do with the payment of the incumbrance, and it was entirely the concern of the appellants to pay the debt charged upon the properties. Stress was laid particularly on the words " without our having any concern with the same " as showing that the intention of the parties was that the discharge of the mortgage should be the sole responsibility of the vendees who took the property subject to the burden attached to it ; and reference was made to the observation of the learned Chief Justice in *Naima Khatun* v. *Sardar Basant Singh*[1]..

" Where the previous encumbrances are a charge exclusively on the property transferred to the vendee, the result is that only the equity of redemption is sold and it is the concern of the vendee whether or not to discharge the previous encumbrances."

We are unable to accept this view of the transaction. As will be seen from the terms and recitals in Ex. A referred to above, the price of the properties was fixed on the basis of their full value excluding the encumbrance from consideration, and credit was given, towards the payment of such price, for the amount payable to the mortgagee as the vendees agreed to pay it to him. The phrase " without our having any concern with the same " on which Mr. Rangachari laid so much stress may well have been intended to convey that the vendors looked to the vendees to pay off the debt as sufficient out of the purchase money was left in their hands for the purpose. But the whole clause amounts, in our opinion, to no more than a recognition in express terms of what a vendee is entitled and bound to do under the proviso to section 55 (5) (*b*) of the Transfer of Property Act, and is perfectly consistent with the sale being free from encumbrances. Reference was made to the decision in *Kaliyammal* v. *Kolandavela Gounder*[2], as showing that an undertaking by a vendee to pay off a mortgage on the property out of the purchase money left in his hands for the purpose amounts to nothing more than a covenant for indemnity which, according to the Privy Council decision already referred to, would not entitle the vendor to participate in any benefit which the purchaser might derive from his purchase. That was a suit for damages brought by a vendor who had conveyed by way of absolute sale certain property for Rs. 27,000 which sum the vendee undertook to pay in discharge of a debt charged on the property. The vendee failed to pay the amount accordingly and the mortgagee recovered from the vendor the balance of the debt after crediting the sale proceeds of the property which proved insufficient to satisfy the debt in full. The vendor then brought the suit after the lapse of more than six years from the date of the sale but within three years from the

1. (1933) I.L.R. 56 All. 766 (F.B.). 2. (1916) 5 L.W. 228.

date of the payment by the vendor to the mortgagee. It was held that Art. 83 of the Limitation Act applied and the suit was in time as a covenant to indemnify the vendor should, in the circumstances, be implied from the nature of the transaction. The learned Judges observed,

> "No doubt the property conveyed by Ex. A is valued at Rs. 27,000, which is also stated to be the consideration for the sale. But it is perfectly clear upon the facts, and it is not disputed, that the real value of the property was more than Rs. 27,000, and that, as a matter of fact, the transfer was made more by way of gift than as an ordinary transaction of sale. It would be unreasonable to hold that, in a transaction of this nature, the transferor expected or contemplated any further liability with respect to the encumbrance . . . No doubt there are cases in which the gist of the transaction is that the vendor leaves part of the sale proceeds in the hands of the vendee with a direction that he shall pay the debts for which the vendor was liable. In such cases of absolute covenant it is open to the vendor to sue the vendee as soon as he fails to pay the debts as they become due and the words of such a covenant may be inconsistent with a covenant to indemnify, properly so called. The case of *Raghunatha* v *Sadagopa*[1] appears to have been one of that nature"

It will thus be seen that the decision was based on the peculiar facts of that case and has not much bearing on the construction of the contract of sale here in question. We are of opinion that the sale under Ex. A was, as between the parties thereto, intended to be free from encumbrances, that the sum of Rs, 5,682-7-0 was part of the purchase money left in the hands of the appellants for the specific purpose of paying off the mortgage of Venkatappayya on behalf of the respondents who were bound to discharge that encumbrance and that the appellants should return the unexpended balance which, as a result of the statutory reduction of the debt, it was subsequently found unnecessary to pay to the mortgagee.

The next question argued before us related to an alleged payment of Rs. 1,000 by the appellants to the mortgagee on September, 4, 1935. This was the subject of Issue No. 2 but the Court below has recorded no finding upon it though it has passed a decree for the full amount claimed with interest and costs. It is, however, to be observed that in the mortgagee's suit (O. S. No. 19 of 1939) he admitted this payment and gave credit for it in his plaint, and the respondents herein pleaded in their written statement in that suit that the amount should go in reduction of the principal of the mortgage debt. In the present suit a copy of the plaint in O. S. No. 19 of 1939 was filed and no witnesses were examined on either side, the admission of the mortgagee being apparently regarded as sufficient to prove such payment. In that Court the appellants have filed C. M. P. No. 3284 of 1942 for admitting in evidence certified copies of the written statement filed by the present respondents in that suit and the judgment therein and we have admitted these documents as additional evidence in the case, (marked as Exs. VI and VI-a). Mr. Govindarajachari, however, drew our attention to Ex. D-2 which is a registered notice issued by the mortgagee's pleader to the appellants under instructions given by the mortgagee's agent wherein the payments made by the respondents towards the mortgage debt are referred to but no reference was made to this payment of Rs. 1,000 by the appellants on September 4, 1935, and suggested that the so-called admission in the mortgagee's plaint regarding the payment in question must be due to collusion between the mortgagee and the appellants, as the latter were then endeavouring to make out that they had personally undertaken to pay the amount due to the mortgagee with a view to strengthen the claim which they have put forward in this suit. We see no force in this suggestion. It is no doubt true that in his plaint (Ex. E) the mortgagee stated that the sum of Rs. 1,000 received from the appellants was appropriated towards interest, a statement which, if established, would not affect his claim in the suit as appropriations made prior to 1st October, 1937, are not affected by Act IV of 1938. But there was no guarantee that the appropriation put forward would be accepted by the Court, and the mortgagee would be running considerable risk in admitting that such a payment was made if it was not true. Furthermore, the respondents themselves having claimed, though unsuccessfully, that such payment should go in reduction of the principal of the debt, must be taken to have admitted the truth of the payment. The absence of any reference to it in Ex. D-2 might well be due, as suggested by the appellants' learned counsel, to the fact that the notice

1. (1911) 21 M.L.J. 983 : I.L.R. 36 Mad. 348.

was issued on the instructions of the mortgagee's agent who was probably not aware of the payment. On the whole we have come to the conclusion that the appellants did pay Rs. 1,000 to the mortgagee on September 4, 1935, as alleged by them.

It was then urged by Mr. Govindarajachari that, even so, the appellants should not be given credit for that sum against the respondents' claim in this suit, as it must be taken to have been paid towards the interest accruing due on the mortgage debt subsequent to the sale for which the appellants were responsible by reason of their having delayed the payment of the sum of Rs. 5,682-7-0 reserved with them for the purpose. In point of fact, such subsequent interest upto the date of the payment, *i.e.*, 4th September, 1935, amounts only to about Rs. 600 and the balance of Rs. 400 must in any event be taken to have been paid out of the amount retained by the appellants. We are, however, inclined to hold that the appellants are entitled to credit for the entire sum of Rs. 1,000 paid by them to the mortgagee, for, the appellants are liable to refund only the unexpended balance, if any, of the purchase money in their hands. It is no doubt true that if the appellants had not paid the sum, it would not have to be paid as all interest outstanding on the mortgage on 1st October, 1937, was wiped out under Act IV of 1938, but it cannot be said on that account that any payment made by the appellants towards the mortgage debt before that date was not made out of the money left in their hands.

The last contention on behalf of the appellants was that the respondents' claim to interest on the sum of Rs. 5,682-7-0 from the date of the sale to the date of plaint was untenable. It is to be observed that both under the terms of the sale deed and under section 55 (5) (*b*) of the Transfer of Property Act, the amount retained by the appellants out of the purchase money for payment to the mortgagee could not be and was not, claimed by the respondents, as the property had to be cleared of the encumbrance. There was thus no wrongful withholding of money payable to the respondents ; nor did the latter suffer any damage by reason of the appellants' failure to pay the amount to the mortgagee according to the stipulation in the sale deed. Indeed the delay in payment of the amount has benefited the respondents by reason of Act IV of 1938 having come into force, as they would not otherwise be entitled to put forward their present claim. There is thus no legal basis for the respondents' claim to interest on the sum reserved with the appellants for payment to the mortgagee. It was suggested that interest could be awarded under section 55 (4) (*b*) of the Transfer of Property Act which provides for a charge on the property sold for the purchase money or any part thereof remaining unpaid and for interest on such amount or part from the date on which possession has been delivered. But this general provision clearly pre-supposes that the purchase money or part thereof remaining unpaid is payable to the seller and can have no application to a case where the buyer is entitled and allowed to retain out of the purchase money the amount of an encumbrance on the property for payment to the person entitled thereto. We are therefore of opinion that the respondents are not entitled to any interest from the appellants till Act IV of 1938 came into force. Thereafter, the position might be different, if the appellants had without cause delayed payment to the mortgagee and thus incurred further liability for interest on the mortgage debt at the statutory rate of 6¼ per cent. per annum. But the circumstances of the case clearly disclose that the appellants were not responsible for the subsequent delay in the payment of the amount due to the mortgagee. Soon after the Act came into force, the respondents issued a notice (Ex. B) dated April 23, 1938 requiring the appellants not to pay the sum left in their hands to the mortgagee but to pay it to themselves. And there was dispute between the appellants and the mortgagee, and much correspondence, as to the amount properly payable to the latter according to the provisions of the Act with the result that the mortgagee filed his suit in June, 1939 (O. S. No. 19 of 1939) for recovery of the amount due under the mortgage as scaled down under the Act. Having regard to the great uncertainty that prevailed as to the true interpretation and effect of many of the provisions of the Act, it cannot be said that the dispute raised by the appellants regarding the mortgagee's claim was not *bona fide* and it cannot therefore be said that they delayed payment of the debt without proper cause. It follows that they

are entitled to credit as against the respondents for the full amount declared due to the mortgagee in O. S. No. 19 of 1939 and that they are not liable to pay any interest to the respondents till the date of suit on any amount which the appellants will be liable to refund to them after satisfying the decree in O. S. No. 19 of 1939.

In the result, the appeal is allowed to the extent indicated and the decree of the Court below will be modified accordingly. The parties will pay and receive proportionate costs here and in the Court below.

K.C. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

Kuppuswami Goundan .. *Appellant** (*2nd Defendant*)

v.

Devakottah Lakshmanan Chettiar .. *Respondent* (*Plaintiff*).

Hindu Law—Debts—Suit against father and son—Limitation—Exclusion of time under section 78 of the Provincial Insolvency Act by reason of pendency of insolvency proceedings against father—Suit against the son also not barred.

Where a suit was filed against a Hindu father on a promissory note executed by him and against his son on the debt and the suit was found to be in time as against the father by virtue of the exclusion of the period under section 78 of the Provincial Insolvency Act during which insolvency proceedings were pending against the father, the suit against the son is not barred by limitation and if the debt had been lawfully incurred the son would be liable to the extent of the family property in his hands.

Mohana Reddi v. *Ganga Raju*, (1941) 2 M.L.J. 311: I.L.R. 1942 Mad. 95 (F.B.), applied.

Decision of *Somayya, J.*, in S. A. No. 575 of 1940, affirmed.

Appeal under section 15 of the Letters Patent against the judgment of the Hon'ble Mr. Justice Somayya dated the 19th day of December, 1941 and the 30th day of January, 1942 as amended and made in S. A. No. 575 of 1940, preferred to the High Court against the decree of the Court of the Subordinate Judge of Coimbatore in A. S. No. 59 of 1939 preferred against the decree of the Court of the District Munsif of Dharapuram in O. S. No. 567 of 1936.

K. Rajah Aiyar, T. R. Srinivasan, R. Desikan and *R. Viswanathan* for Appellant.

T. V. Muthukrishna Aiyar, N. Sivaramakrishna Aiyar and *T. S. Venkatarama Aiyar* for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—The appellant is the undivided son of one Ponnambala Goundan. On the 23rd March, 1925, the father and another person executed a promissory note in favour of the respondent for the sum of Rs. 855. On the 18th March, 1928, they made a payment towards the amount due on the promissory note. The fact of payment was indorsed upon the instrument and the indorsement was signed by the makers. On the 12th April, 1928, the father applied to be adjudicated an insolvent under the provisions of the Provincial Insolvency Act and the order of adjudication was passed on the 5th September of that year. The adjudication was annulled on the 25th August, 1934, whereupon the respondent instituted a suit against the father and son to recover the amount due to him. The father was sued on the instrument and the appellant on the debt by reason of the pious obligation rule. The appellant pleaded that the suit was barred by the law of limitation so far as he was concerned. The District Munsif accepted this plea and granted a decree against the father. This decision was concurred in by the Subordinate Judge on first appeal. The respondent then appealed to this Court. His appeal was heard by Somayya, J., who held that the case was governed by the decision of this Court in *The Official Receiver of Guntur* v. *Sait Lalchand Khushalchand*[1] and allowed the appeal. The learned Judge was apparently of the opinion that it was a hard case and consequently deprived the respondent of his costs. Each party was directed to bear his own costs. Leave having been

*L. P. A. No. 14 of 1942. 5th January, 1943.

1. A.I.R. 1943 Mad. 94: 1942 M.W.N. 470.

granted under clause 15 of the Letters Patent the appellant has appealed, against the decision holding him liable on the debt and the respondent has filed a memorandum of cross-objections against the decision of the learned Judge on the question of costs.

The learned advocate for the appellant says that section 78 (2) of the Provincial Insolvency Act does not apply so far as his client is concerned ; it operates merely to save limitation as against the father. We will take this to be the case, but that does not mean that the decision of Somayya, J., is wrong. In fact, there is a decision of a Full Bench of this Court which clearly shows that the decision is right. The case referred to is *Mohana Reddi* v. *Gangaraju*[1]. This case is referred to in the judgment under appeal but the learned Judge preferred to base his decision on *The Official Receiver of Guntur* v. *Sait Lalchand Khusalchand*[2], because there direct reference is made to section 78. In *Mohana Reddi* v. *Gangaraju*[1] the question was whether an acknowledgment by a Hindu father in a schedule filed by him in insolvency proceedings operated to save limitation on the debt so far as his son was concerned, the debt being a pre-partition debt. It was held that as the acknowledgment saved the debt as against the father the son was liable under the pious obligation rule ; all that the Court had to do was to inquire whether the debt was lawfully incurred before partition and whether it was still enforceable against the father ; if it was lawfully incurred and was still enforceable against the father, the son was liable to the extent of the family property in his hands.

The present debt is clearly enforceable against the father. In fact, the creditor has obtained a decree in respect of it. Here there has been no partition. The debt is a lawful one and as the father is liable, the son is also liable under his personal law. The appeal must be dismissed with costs.

We can see no valid reason for depriving the respondent of his costs. He succeeded before Somayya, J., and should have had his costs in that Court and in the Courts below. The memorandum of cross-objections will be allowed with costs. The decree for costs in the first two Courts will be against the father and the son.

K. S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, AND MR. JUSTICE LAKSHMANA RAO.

Rukmani Achi and another .. *Appellants**

v.

Sampoornathammal .. *Respondent.*

Civil Proccedure Code (V of 1908), O. 33, r. 11, (as amended)—Unsuccessful suit in forma pauperis *—Court-fees—Cannot be ordered to be paid by defendant even if his interests were same as those of the plaintiff.*

Under rule 11 of Order 33, Civil Procedure Code, as it now reads, it is clearly not open to the Court to order a defendant to pay the Court-fee. Accordingly the Court cannot make an order for the payment of Court-fee against some of the defendants as well in an unsuccessful suit filed in *forma pauperis* on the ground that their interests were the same as those of the plaintiff.

Appeal under Cl. 15 of the Letters Patent against the judgment of Venkataramana Rao, J., dated 19th December, 1941, and made in S. A. No. 305 of 1940 preferred to the High Court against the decree of the Court of the Subordinate Judge of Tanjore in A. S. No. 51 of 1939 against the decree of the Court of the District Munsif, Mannargudi in O. S. No. 186 of 1935.

A. V. Viswanatha Sastri for Appellants.

The Government Pleader (K. Kuttikrishna Menon) for Respondent.

The Judgment of the Court was delivered by

The Chief Justice:—The appellants are the second and third defendants in the suit which has given rise to this appeal. The suit was filed in *forma pauperis*

* Letters Patent Appeal No. 8 of 1942. 6th January, 1943.

1. (1941) 2 M.L.J. 311 : I.L.R. 1942 Mad. 95 (F.B.).

2. A.I.R. 1943 Mad. 94 : 1942 M.W.N. 470.

and was unsuccessful. The appellants did not appear, but the order for the payment of Court-fee was made against them as well because their interests were the same as those of the plaintiff. This decision was upheld by the Subordinate Judge and Venkataramana Rao, J., in second appeal. This appeal is against the learned Judge's judgment under Cl. 15 of the Letters Patent.

The cases referred to by the learned Judge can no longer be regarded as having application here. O. 33, r. 11 has been amended since the decision in *Neelamma* v. *Mareppa*[1], the latest of the decisions referred to in the judgment under appeal. The rule as it now stands directs that where the plaintiff in a pauper suit fails, the Court shall direct him to pay the Court-fee. The rule provides for one exception, namely, the case of a suit by the next friend of a minor plaintiff. If a suit filed by the next friend has been filed unreasonably or improperly, the Court may order the next friend to pay personally the Court-fee. As the rule reads now it is clearly not open to the Court to order a defendant to pay the Court-fee. It is to be remembered that this is not a question of an order for costs. The Court's discretion in the matter of costs, other than the Court-fee, is not hampered.

The appeal will be allowed with costs throughout. In this Court and before Venkataramana Rao, J., the costs will be payable by the Government.

K.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, AND MR. JUSTICE LAKSHMANA RAO.

K. Satyanarayanappa and others .. *Appellants** (*Plaintiffs 2 to 5*)

v.

Rahimatullah Sahib and others — *Respondents* (*Defendants and 1st Plaintiff*).

Madras Co-operative Societies Act (VI of 1932), S. 51—Hindu joint family—Some members being members of Society—Application by non-members to set aside award and sale—Maintainability.

Where some only of the members of a Hindu joint family are members of a Co-operative Society and the family as such is not a member there is nothing in S. 51 of the Madras Co-operative Societies Act preventing the persons who are not members of the Society from instituting a suit for a declaration that the sales which took place as a result of the awards obtained by the Society did not pass their interests in the properties to the purchasers. Similarly the persons who are members of the Society can bring a suit against the auction-purchasers for similar relief, though they cannot bring a suit against the Society in respect of a dispute touching the business of the Society.

Laxman v. *Dhamori Co-operative Society*, A.I.R. 1933 Nag. 211 not followed.

Appeals against the decrees of the District Court of Anantapur in A.S. Nos. 118 and 119 of 1940 respectively preferred against the decrees of the Court of the District Munsif of Anantapur in O. S. No. 183 and 4 of 1938 respectively.

Kasturi Seshagiri Rao for Appellants.

P. Chandra Reddi for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—The question in these appeals is whether the suits out of which they arise are maintainable. They were filed in the Court of the District Munsif of Anantapur. The District Munsif held that by reason of S. 51 of the Madras Co-operative Societies Act, 1932, they were not maintainable and this decision was concurred in on appeal by the District Judge of Anantapur. The appeals are from the decrees passed by the District Judge. As we are of the opinion that the suits are maintainable to a limited extent it is necessary to set out the facts.

The plaintiffs in both the suits are the sons of one Venkataramappa, who is now dead. Venkataramappa was a member of the Alamur Co-operative Credit Society. He was indebted to that Society in respect of two loans made by the

1. (1935) 70 M.L.J. 128.

*Second Appeals Nos. 910 and 1167 of 1941. 7th December, 1942.

Society to him. Each loan was secured by a mortgage of immoveable property. The father was joint with his sons and the property mortgaged was family property. The debts were not repaid and the Society was compelled to institute proceedings under the Act for the enforcement of the mortgages. In due course awards were obtained and these were executed by the sale of the mortgaged properties, which were bought by the contesting respondents in these appeals. S. A. No. 910 of 1941 arises out of O. S. No. 183 of 1938 of the Court of the District Munsif of Anantapur and S. A. No. 1167 of 1941 out of O. S. No. 4 of 1938 of that Court. In O. S. No. 183 of 1938 the defendants were the first respondent in S. A. No. 910 of 1941 and the Co-operative Society. In O. S. No. 4 of 1938 the defendants were the three purchasers of the properties sold in execution of the awards; the President of the Co-operative Society; the plaintiffs' father, who died pending the suit and the manager of the Society. In the suit first mentioned the plaintiffs alleged that the sale was illegal because the rules had not been complied with and that the properties had been purchased at prices which were inadequate. They also raised the plea of limitation. They averred that they were in possession of the properties and merely asked that the sales should be set aside. In O. S. No. 4 of 1938 they raised similar pleas and added a plea that their father had contracted the loan for his own immoral purposes. Here they asked for a declaration that the proceedings taken by the Society in which the awards were obtained were not binding upon them, for an order directing the auction purchasers to deliver the properties to them and for an order for mesne profits.

S. 51 of the Madras Co-operative Societies Act provides that if a dispute touching the business of a Society arises between a member, past member or person claiming through a member, past member or deceased member and the Society, its Committee, or an officer, agent or servant of the Society, the dispute shall be referred to the Registrar for decision. The father was a member of the Society and it appears that the first and second plaintiffs were also members. The family, as such, was not a member and we do not share the opinion expressed by the Nagpur High Court in *Laxman* v. *Dhamori Co-operative Society*[1], that where the father, who is joint with his sons, is a member of a Co-operative Society, it must be presumed that all the members of the joint family are members of the Society. It is not necessary in this case to decide whether a joint family can be a member of a Co-operative Society, for in this case it is not suggested that this family was a member, and the case must proceed on the basis that the father in obtaining the membership did not represent the family.

There is nothing in section 51 which prevents the plaintiffs who were not members of the Society instituting a suit for a declaration that the sales which took place as the result of the awards obtained by the Society did not pass their interests in the properties to the purchasers. Similarly we consider that the two plaintiffs who are said to be members of the Society could also bring a suit against the auction purchasers for similar relief; but if the first and second plaintiffs are members of the Society they cannot bring a suit against the Society in respect of a dispute touching the business of the Society. It is quite clear that the Society has been wrongly made a defendant in O. S. No. 183 of 1938 and that the same applies with regard to the President and manager made parties in O. S. No. 4 of 1938. So far as the Society and its officers are concerned these suits are not maintainable by the first and second plaintiffs because of the provisions of S. 51. There is nothing to prevent the other plaintiffs joining the Society or its officers as defendants, but manifestly they cannot obtain any relief against them. Therefore the Society must be struck out as a defendant in O. S. No. 183 of 1938 and the names of the fourth and sixth defendants in O. S. No. 4 of 1938 must also be struck out.

Subject to these directions the appeals will be allowed and the suits remanded to the District Munsif's Court to be tried on their merits. We will add that the

1, A.I.R. 1933 Nag. 211.

prayer of the plaintiff asking for the setting aside of the sales, cannot be granted to them. So far as the interests of the father in the properties sold are concerned the sales will stand because his interests did pass to the purchasers. Whether the plaintiffs are entitled to relief in respect of their shares is another matter. Here the pious obligation rule may have bearing.

The costs of the appeals will be made costs in the suits. The Society and its President and manager will retain the costs awarded to them by the Courts below.

The appellants will be entitled to a refund of the court-fee paid on the memoranda of appeal.

B.V.V. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMAYYA.

Paidipati Kamma Narasayya .. *Petitioner**

v.

D. Thimmappa and another .. *Respondents.*

Civil Procedure Code (V of 1908), Order 43, rule 1, clauses (c), (d) and (j)—Application to set aside dismissal for default—Dismissal of application itself for default—Appeal against order—Whether lies.

When an application to set aside the dismissal for default of a suit was dismissed in its turn for default and an appeal was preferred against that order, on the question whether such an appeal lay,

Held, that under Order 43, rule (1) (*c*), Civil Procedure Code, an appeal will lie and that the order holding that no appeal lay was erroneous.

Uma Datt v. *Mt. Zakia Bibi*, A.I.R. 1936 All. 737, followed.

There is no reason to confine the order passed on an application under Order 9, rule 9 to one passed on the merits; whether the application is dismissed on the merits or for default, it will nevertheless be an order rejecting an application for an order to set aside the dismissal of a suit and will be appealable under Order 43, rule 1 (*c*).

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the District Court of Anantapur dated 15th January, 1942 and made in C. M. A. No. 37 of 1941 preferred against the order of the Court of the District Munsif of Anantapur dated 1st October, 1941 and made in I. A. No. 474 of 1941 in O. S. No. 121 of 1940.

A. Lakshmayya for Petitioner.

K. Kalyanasundaram (amicus curiæ).

The Court delivered the following

JUDGMENT.—O. S. No. 121 of 1940 on the file of the District Munsif's Court, Anantapur, was dismissed for default on 22nd July, 1941. An application to set aside the dismissal for default was filed on 25th July, 1941, by I. A. No. 474 of 1941. This application was dismissed for default by an order dated 1st October, 1941. Against this order an appeal was preferred by the plaintiff and the District Judge of Anantapur dismissed the appeal holding that no appeal lay against the order of the District Munsif dated 1st October, 1941.

Order 43, rule 1 (*c*) under which the appeal was preferred to the lower appellate Court runs thus:

"An appeal shall lie from the following orders under the provisions of section 104, namely:—

(*c*) an order under rule 9 of Order 9 rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit."

This order applies in terms to the order of the District Munsif dated the 1st October, 1941. I. A. No. 474 of 1941 was an application for an order to set aside the dismissal of the suit, and the order passed on 1st October, 1941, rejecting this application for default is certainly an order rejecting the application for an order to set aside the dismissal of a suit. Apparently there is no reason to confine the order passed on an application under Order 9, rule 9 to one passed on the merits. Whether that application was dismissed on the merits or for default, it is nevertheless an order rejecting an application for an order to set aside the dis-

* C. R. P. No. 909 of 1942. 29th January, 1943.

missal of a suit. The wording of Order 43, rule 1 (*c*) is in support of an appeal being entertained under that clause. The District Judge referred to the decision in *Bajit Lal Pathak* v. *Maharajadhiraj Sir Rameshwar Singh Bahadur*[1]. That decision held that an order dismissing a petition under Order 9, rule 9 for default was not appealable. As no case of any other High Court in point was brought to the notice of the District Judge, he considered that he ought to follow that decision and he accordingly rejected the appeal. In this Court, the correctness of the above decision of the Patna High Court is challenged. The respondents do not appeal and, as I thought that some one should represent the case of the respondents, I requested Mr. Kalyanasundaram to argue the matter as *amicus curiae*. He was good enough to do so and has brought to my notice various decisions of the other High Courts which bear on the question.

There is a direct decision of the Allahabad High Court on the question whether an order dismissing for default an application under Order 9, rule 9 is appealable under Order 43, rule 1 (*c*), in *Uma Datt* v. *Mt. Zakia Bibi*[2]. It is unfortunate that this decision was not brought to the notice of the lower appellate Court. The learned Judges, Harries and Bajpai, JJ., held that an appeal does lie. They pointed out that there is no reason to restrict an order under Order 9, rule 9 to one passed on the merits. They referred to the decision of the Patna High Court in *Mufti Reazuddin* v. *Lala Maheshanand*[3], which dealt with an order passed under Order 9, rule 13. In that case, the suit had been decreed *ex parte* ; an application to set aside the decree *ex parte* was dismissed for default ; an appeal was filed against that order ; and the question was whether an appeal lay. The learned Judges held that an appeal lay under Order 43, rule 1 (*d*) and pointed out that there was no reason to restrict an appealable order to one passed on the merits. One of the learned Judges made a reference to the earlier decision of that Court in *Bajit Lal Pathak* v. *Maharajadhiraj Sir Rameshwar Singh Bahadur*[1] on which the lower appellate Court relied in this case and said that he did not agree with that decision. Had the attention of the District Judge been drawn to this later decision of the Patna High Court and to the decision of the Allahabad High Court just referred to, the decision of the lower appellate Court might well have been otherwise. In addition to the decision in *Mufti Reazuddin* v. *Lala Maheshanand*[3], there is an earlier decision of that Court in *Mussamat Bodhia* v. *Ram Chandra Marwari*[4], which also held that, where an application to set aside an *ex parte* decree had been dismissed for default under Order 9, rule 13, an appeal lay under the provisions of Order 43, rule 1 (*d*). The learned Judges referred to and followed the decision of the Calcutta High Court to that effect in *Kumud Kumar Bose* v. *Hari Mohan Samaddar*[5], where Mookerjee and Newbould, JJ., pointed out that it was immaterial that the application to set aside the *ex parte* decree had been dismissed, not on the merits, but for default. The same view was taken by the Calcutta High Court in a later decision in *Ansarali* v. *Bhim Sankar Datta Tewari*[6], where an application under Order 21, rules 90 and 92 had been dismissed for default and the question was whether an appeal lay under Order 43, rule 1 (*j*). The wording of clauses (*c*), (*d*) and (*j*) of rule 1 of Order 43 is similar and the decisions under the clauses apply. The case falls under clause (*c*) of rule 1 of Order 43.

I hold that an appeal lay to the lower appellate Court and that the order of the District Judge holding that no appeal lay is erroneous. I set aside the order of the District Judge and remand the appeal for disposal according to law. The costs of this revision will be provided for in the appeal.

I am indebted to Mr. Kalyanasundaram for having brought to my notice the decisions referred to above, and he is quite right in having done so, though the decisions are really against the respondents.

K. C. ——— *Case remanded*

---

1. (1928) I.L.R. 7 Pat. 333.
2. A.I.R. 1936 All. 737.
3. (1928) I.L.R. 8 Pat. 533.
4. (1927) I.L.R. 6 Pat. 474.
5. (1916) 21 C.L.J. 628.
6. (1929) I.L.R. 56 Cal. 969.

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE LAKSHMANA RAO AND MR. JUSTICE KRISHNASWAMI AYYANGAR.

Damodarasami Naicken and others .. *Appellants** *(Defendants)*

v.

Minor Govindarajulu Naidu and another .. *Respondents (Plaintiffs)*.

Transfer of Property Act (IV of 1882), section 82—"In the absence of a contract to the contrary"—Interpretation.

The words "in the absence of a contract to the contrary" in section 82 of the Transfer of Property Act relate to a contract to which the mortgagee is a party and such a contract will run with the land. There is nothing to preclude mortgagors agreeing what their liabilities with regard to contribution shall be *inter se.*

Ramabhadrachar v. *Srinivasa Aiyangar*, (1900) I.L.R. 24 Mad. 85, approved.

Muthiah Bhagavathar v. *Venkatarama Aiyar*, (1935) 69 M.L.J. 303: I.L.R. 59 Mad. 121, considered.

Where a mortgage embraces several properties owned by different mortgagors a person who acquires the interest of one or more of the mortgagors will not be bound by an agreement between the mortgagors *inter se* unless he agrees to be bound by it.

Appeal against the decree of the District Court of Coimbatore in A. S. No. 195 of 1940 preferred against the decree of the Court of the Subordinate Judge of Coimbatore in O. S. No. 216 of 1938.

Order of reference† made by *Wadsworth* and *Patanjali Sastri, JJ.*, referring the following questions to a Full Bench :—

1. Whether a contract to the contrary between the co-mortgagors alone can exclude the operation of section 82 of the Transfer of Property Act ?

2. If the answer to question No. 1 is in the affirmative, whether such a contract binds a subsequent assignee of the property of a co-mortgagor with notice of the contract ?

D. Ramaswami Aiyangar for Appellants.

A. C. Sampath Aiyangar and *V. C. Veeraraghavachariar* for Respondents.

Opinion of the Full Bench.

The Judgment of the Court was delivered by

The Chief Justice.—In the month of September, 1909, one Rangasami Naicken and his three sons, Govindasami, Venkatasami and Narayanasami, who constituted an undivided family, mortgaged immovable properties belonging to the family to one Lakshminarasimha Aiyar to secure the sum of Rs. 3,000. In 1912 the family separated and there was a partition of the family estate. The mortgaged properties were divided into four shares and one share was allotted to each member. The deed of partition provided that the mortgage-debt should be discharged by the sons in other words, each son was to be liable for one-third of the total debt. In 1913 Govindasami, the fourth defendant in the suit, mortgaged his share of the family properties to Gurusami, the father of the defendants 1 to 3, to secure a loan of Rs. 2,500. Govindasami failed to repay the loan and consequently Gurusami was compelled to institute a suit on his mortgage. He obtained a decree and in execution proceedings in 1926 he bought Govindasami's interest in the hypotheca, which was, of course, subject to the prior mortgage in favour of Lakshminarasimha Aiyar. Lakshminarasimha Aiyar died and in 1927 his legal representatives sued to enforce the mortgage which had been created in his favour. They obtained a decree, which contained a direction that the properties purchased by Gurusami should not be brought to sale until the mortgaged properties in the hands of Venkatasami had been sold. Venkatasami had acquired the share of his brother Narayanaswami and therefore possessed two of the shares. The record does not disclose who held the father's share. In execution proceedings instituted in 1928 Lakshminarasimha Aiyar's legal representatives sold the properties in the hands of

* Second Appeal No. 225 of 1941. 3rd February, 1943.
† 5th January, 1943.

Venkatasami, but Venkatasami paid into Court sufficient to obtain an order setting aside the sale under the provisions of Order 21, rule 89, Civil Procedure Code, and consequently it was set aside.

The plaintiffs in the present suit are the legal representatives of Venkatasami who is also now dead. They sued to recover from Gurusami and his sons one-third of the amount which Venkatasami had been compelled to pay to obtain the order setting aside the sale and relied on the provisions of section 82 of the Transfer of Property Act. The Subordinate Judge of Coimbatore, who tried the suit, upheld the plaintiff's claim and on appeal his decision was concurred in by the District Judge. The basis of the decision was that Gurusami was bound by the agreement embodied in the deed of partition that the sons should discharge the mortgage in equal proportions. The defendants contend that they cannot be compelled to contribute more than a quarter of the sum as the words "in the absence of a contract to the contrary" in the first paragraph of section 82 have reference only to a contract which governs both the mortgagee and the mortgagor. There is a conflict of authority of this Court on this question and in the circumstances the learned Judges before whom this appeal came for hearing have referred the following questions to a Full Bench for decision:

"1. Whether a contract to the contrary between the co-mortgagors alone can exclude the operation of section 82 of the Transfer of Property Act?

2. If the answer to question No. 1 is in the affirmative, whether such a contract binds a subsequent assignee of the property of a co-mortgagor with notice of the contract?"

The first paragraph of section 82 was amended by the Transfer of Property (Amendment) Act, 1929. Before the amendment this paragraph read as follows:

"Where several properties whether of one or several owners, are mortgaged to secure one debt, such properties are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage, after deducting from the value of each property the amount of any other incumbrance to which it is subject at the date of the mortgage."

This paragraph now reads as follows:

"Where property subject to a mortgage belongs to two or more persons having distinct and separate rights of ownership therein, the different shares in or parts of such property owned by such persons are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage, and, for the purpose of determining the rate at which each such share or part shall contribute, the value thereof shall be deemed to be its value at the date of the mortgage after deduction of the amount of any other mortgage or charge to which it may have been subject on that date."

As pointed out in Mulla's "Transfer of Property Act" (second edition, page 486) the amendment makes two improvements. In the first place the section is made to apply not only where several properties are mortgaged, but where the mortgaged property is subsequently divided into shares held in severalty, and in the second place it fixes the date of the mortgage as the date at which the valuation for the purpose of contribution should be made. The amendment admittedly goes no further.

The words "whether of one or several owners" which appeared in the section before its amendment are of importance when considering the answers to be given to the questions under reference. In a case where several properties were mortgaged and all belonged to the same person there could only be a "contract to the contrary" between the mortgagee and the mortgagor. It takes two persons to make a contract and the words "in the absence of a contract to the contrary" cannot be divorced from the words which precede them. It is also to be observed that the section imposes the liability to contribute on the land and not on the individual.

Until the decision in 1935 of *Muthiah Bhagavathar* v. *Venkatarama Aiyar*[1], the opinion of this Court was that the words "in the absence of a contract to the contrary" meant in the absence of a contract to the contrary between the mortgagee and the mortgagor. The question was first debated in *Ramabhadrachar* v. *Srinivasa Aiyangar*[2], where the facts were analogous to the facts in the present case. After

1. (1935) 69 M.L.J. 303 : I.L.R. 59 Mad. 121.

2. (1900) I.L.R. 24 Mad. 85.

the creation of a mortgage of joint family properties the father and his three sons, who constituted the family, separated. Each took a fourth share in the family properties and agreed amongst themselves that each should be liable for a fourth of the mortgage debt. Subsequently one of the sons sold the greater portion of his share to the plaintiff in the suit to whom he gave a security bond for a sum of money and a mortgage over other property to indemnify him from loss which might arise if the mortgagee of the family properties brought them to sale. The mortgagee of the family properties sued on his mortgage and in execution sold part of the hypotheca, thereby realising sufficient to satisfy the decree. The part sold included the property which the plaintiff had bought from the son. Thereupon the plaintiff sued on his security bond and the land mortgaged to him was sold. The plaintiff then brought a suit under section 82 of the Transfer of Property Act and claimed rateable contribution from the other portions of the hypotheca which had not been sold to satisfy the mortgagee's decree. It was held that he was entitled to rateable contribution. The defence was that the plaintiff was only entitled to contributions in respect of monies paid by him in excess of one quarter of the mortgage debt. In rejecting this contention the Court (White, C. J. and Benson J.) observed:

"This question depends upon the construction of the words 'in the absence of a contract to the contrary' in section 82 of the Transfer of Property Act. Having regard to the principle upon which the equitable doctrine of contribution is based, as illustrated in the English authorities to which our attention has been called, it seems clear that an agreement binding only as between the mortgagors is not a 'contract to the contrary' within the meaning of the section, and that these words were intended to apply to contracts between mortgagor and mortgagee—contracts, for example, under which some of the mortgaged properties were to be liable in the first instance and others were only to be liable in the event of the security of the properties liable in the first instance being insufficient.

In the present case the contract which, it is contended, is a 'contract to the contrary' which prevents the application of the doctrine of rateable distribution, was nothing more than a partition amongst the coparceners of an undivided Hindu family. The proportionate liability of the members of the family *inter se* for the amount of the mortgage debt existed apart from any express contract which they may have chosen to make. The contract as between the parties, the owners of the equity of redemption, is of course binding, but it is not a contract which binds their assigns. Assuming that the plaintiff took with notice of this contract, inasmuch as such a contract does not run with the land at law, he is not bound by it in equity by reason of the fact that he took with notice. (See *Austerbery* v. *Corporation of Oldham*[1].) In our opinion there was no contract to the contrary within the meaning of section 82, and the plaintiff is entitled to rateable contribution."

In *Kunchithapatham Pillai* v. *Palamalai Pillai*[2], Seshagiri Aiyar and Napier, JJ., said with reference to the second paragraph of section 82 that a contract to the contrary can only be between the parties who are liable to contribute, but their ultimate decision did not run counter to *Ramabhadrachar* v. *Srinivasa Aiyangar*[3] and they referred to it with apparent approval. In *Kunchithapatham Pillai* v. *Palamalai Pillai*[2], a mortgagor sold a portion of the mortgaged property to *A* and directed him to pay a part of the mortgage-debt. He sold another portion to *B* with a direction that he should also pay a part of the debt. Later, he sold the rest of the property to *C* with a similar direction. The amount to be paid by *C* was much larger. The purchasers did not pay what they had agreed with the mortgagor to pay to the mortgagee. Consequently the mortgagee brought a suit on his mortgage and obtained a decree. *A* and *B* paid such portions of the debt as would, but for their undertakings, have been proportionately chargeable on the properties purchased by them, but less than what they had undertaken to pay. In order to avoid a sale *C* had to pay to the mortgagee considerably more than what he had agreed with the mortgagor to pay and he sued the other two persons for contribution. It was held that the claim was not sustainable under section 82 of the Transfer of Property Act. The correctness of the decision is not open to doubt from any point of view. The defendants had already paid what they were liable to pay under section 82 and there was no contract between the respective purchasers making them liable to pay more.

1. (1885) L.R. 29 Ch. D. 750.
2. (1916) 32 M.L.J. 347.
3. (1900) I.L.R. 24 Mad. 85.

Jackson, J., followed *Ramabhadrachar* v. *Srinivasa Aiyangar*[1] in *Muthukumaraswami Mudaliar* v. *Govinda Padayachi*[2] and in doing so observed that "a contract to the contrary" within the meaning of section 82 of the Transfer of Property Act was not a subsequent contract between the mortgagors, and if the mortgagors were pleased to distribute their liabilities amongst themselves, that was their personal contract, which did not run with the land.

The next decision of this Court is that in *Muthiah Bhagavathar* v. *Venkatarama Aiyar*[3], which was decided by Ramesam and Venkatasubba Rao, JJ., and it is this case which has given rise to the conflict with *Ramabhadrachar* v. *Srinivasa Aiyangar*[1] Ramesam, J., having said that section 82 has solely to do with the distribution of the burden on the properties in a case, where no other question as to who had the benefit of the money or similar complication arises, proceeded to give indication of the opinion that "a contract to the contrary" within the meaning of the section is a contract between the mortgagors. Venkatasubba Rao, J., was, however, more explicit. He expressly dissented from the opinion held by the learned Judges who had decided *Ramabhadrachar* v. *Srinivasa Aiyangar*[1]. The reason for his dissent is indicated in this passage in his judgment:

> "The section deals with the rights of the owners *inter se* and it would be proper and natural to infer that the contract referred to is a contract between them, that is, those liable to contribute."

In the opinion of Venkatasubba Rao, J., the judgment of the Privy Council in *Ganeshlal* v. *Charan Sing*[4] established this. We shall refer presently to that case but in passing we may say that we do not share his opinion with regard to the effect of the decision.

Madhavan Nair, J., followed *Ramabhadrachar* v. *Srinivasa Aiyangar*[1] in *Subramania Aiyar* v. *Natesa Sastrigal*[5] and in *Arunachalam Padayachi* v. *Ramanatha Chettiar*[6]. On the other hand, Venkataramana Rao, J., followed *Muthiah Bhagavathar* v. *Venkatarama Aiyar*[3] in *Bava Sahib* v. *Krishna Boyan*[7] and in *Muthuswami Pillai* v. *Arasayee Ammal*[8], as did King, J., in *Pattabhirama Reddi* v. *Venkatappayya*[9].

We will now turn to the decision of the Judicial Committee in *Ganeshlal* v. *Charan Singh*[4], where the facts were these. In 1906 the original owner of two properties referred to as *K* and *M* respectively mortgaged them to one Mangal to secure the sum of Rs. 8,000. On the 19th May, 1914, the original owner purported to sell property *K* to one Sher Singh, the ancestor of the respondents, for Rs. 33,000. Out of the purchase price, Rs. 32,000 was left with Sher Singh to enable him to discharge the mortgage of 1906 and other debts of the vendor. In July, 1914, property *M* was sold to the first appellant on behalf of himself and the second appellant in execution of a decree obtained by a creditor of the mortgagor before the 19th May, 1914. The sale was, of course, subject to the mortgage to Mangal. On the 21st May, 1914, property *K* was sold under a decree obtained by another creditor of the mortgagor before the 19th May, 1914. This sale was also subject to Mangal's mortgage. The purchaser later on conveyed this property to Sher Singh. Sher Singh failed to pay off Mangal's mortgage and the other debts of the mortgagor out of the money left with him for the purpose, and Mangal's mortgage continued against both the properties. In 1918 Mangal sued on his mortgage and he obtained a decree for sale. In 1921 the properties were sold, but before the sale was confirmed Sher Singh deposited the amount required to satisfy the mortgagee's claim and thus obtained an order setting aside the sale. Sher Singh having died, the respondents in the appeal, his representatives, launched the suit to compel the appellants as owners of property *M* to contribute towards the amount which Sher Singh had applied in paying off the

---

1. (1900) I.L.R. 24 Mad. 85.
2. (1931) 35 L.W. 145.
3. (1935) 69 M.L.J. 303: I.L.R. 59 Mad. 121.
4. (1930) 59 M.L.J. 177 : L.R. 57 I.A. 189 : I.L.R. 52 All. 358 (P.C.).
5. A.I.R. 1936 Mad. 113.
6. (1936) M.W.N. 859.
7. A.I.R. 1936 Mad. 898.
8. A.I.R. 1936 Mad. 901.
9. (1940) 2 M.L.J. 484.

debt under Mangal's mortgage. The defendants' answer was that there was no right of contribution because Sher Singh had a contract with the mortgagor to apply the Rs. 32,000 which he had received in 1914 when he bought property *K* in payment of the amount due to the mortgagee. The Subordinate Judge on the strength of the decision in *Mohamed Abbas* v. *Mohamed Hamid*[1] held that there was an equitable principle which precluded the respondents from insisting on the right of contribution. The High Court, on the other hand, took a different view, and held that the appellants were not parties to the contract between Sher Singh and the mortgagor for the application of the money, that the benefit of the contract had not in any way passed to them, that in these circumstances the provisions of section 82 applied and that the appellants were bound to make contribution. The Privy Council agreed with this decision. In delivering the judgment of the Board Lord Tomlin said:

"It seems to their Lordships that section 82 is the section that governs the case and that as the Act prescribes the conditions in which contribution is payable it is not proper to introduce into the matter any extrinsic principle to modify the statutory provisions. The decision in the case to which the Subordinate Judge referred may be justified on the footing that in that case there passed to the party from whom contribution was sought the benefit of the contract by which the money was to be applied, so that he could say, 'I have a contract which frees me from the liability to contribution which the section would otherwise impose on me.' No such plea is available to the appellants in this case. They were not parties to the contract of the 9th May, 1914, nor has the benefit of that contract passed to them in law or in equity."

We fail to see anything in this judgment which casts doubt on the decision of this Court in *Ramabhadrachar* v. *Srinivasa Aiyangar*[2], which we regard as good law. As we have already indicated the first paragraph of section 82 of the Transfer of Property Act before the amendment of the section could only be read as contemplating "a contract to the contrary" to which the mortgagee was a party, and the amendment was not intended to alter this position. Moreover this section is based on the English law which is conveniently stated in Fisher on Mortgages (7th edition, page 567) in these words:

"The doctrine of contribution rests upon the principle that a fund, which is equally liable with another to pay the debt, shall not escape because the creditor has been paid out of that other fund alone.

If several estates, whether of one or of several owners are mortgaged for, or subject equally (and not one as surety or collateral security for the other) to one debt . . . . the several estates will contribute rateably to the debt."

Sir V. Bhashyam Aiyangar in his argument in *Ramabhadrachar* v. *Srinivasa Aiyangar*[2] pointed this out. Obviously, there can be no objection to mortgagors agreeing what their rights and liabilities with regard to the contribution *inter se* shall be, but as such a contract will not run with the land it cannot affect a third party, unless he agrees to be bound by it. Where the contract is between a mortgagee and his mortgagors the position is different because such a contract will run with the land.

For the reasons given we hold that the words "in the absence of a contract to the contrary" in section 82 of the Transfer of Property Act relate to a contract to which the mortgagee is a party and such a contract will run with the land. There is nothing to preclude mortgagors agreeing what their liabilities with regard to contribution shall be *inter se*. Where a mortgage embraces several properties owned by different mortgagors a person who acquires the interest of one or more of the mortgagors will not be bound by an agreement between the mortgagors *inter se* unless he agrees to be bound by it. We answer the questions referred in this sense.

The costs of the reference will be made costs in the appeal.

K. S. ——— *Reference answered.*

---

1. (1912) 9 A.L.J. 499. 2. (1900) I.L.R. 24 Mad. 85.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMAYYA.

Thacharakkal Kannoth Areekastanoth Kuttu *alias* Kuttiammu and another .. *Petitioners** (*Plaintiffs*)

v.

Othayoth Kokarippan Kalliani Amma and others. *Respondents* (*Defendants*).

Court-fees—Suit by junior member of putravakasam tavazhi—*Allegation that earlier decree was obtained impleading a member who was not the real karnavan and never had power to manage—Plaintiff not bound to ask for cancellation of such decree or pay* ad valorem *court-fee on it.*

In a suit by the junior members of a *Putravakasam tavazhi*, where the allegations in the plaint (which for the purpose of deciding the question of court-fee must be taken as true) are that a member who was not the real karnavan and never had the right of management vested in him was impleaded in a former suit as the *karnavan* of the *Putravakasam tavazhi*, the plaintiffs are not bound to ask for the cancellation of the decree passed in such suit or pay *ad valorem* court-fee on the amount covered by that decree.

Vasudeva v. *Sankara*, (1897) 7 M.L.J. 102 : I.L.R. 20 Mad. 129 (F.B.) and the decision in *Krishna Menon* v. *Calicut Bank*, (1940) 2 M.L.J. 53 (Short Notes), distinguished.

Lower Courts are not entitled to rely upon short notes of decisions as they are often incomplete.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the Principal District Munsiff of Tellicherry in O. S. No. 531 of 1941.

B. Pocker for Petitioners.

Respondents not represented.

The Court delivered the following

JUDGMENT.—The sole question in this revision petition is whether the court-fee paid by the plaintiffs on their plaint is correct. The plaintiffs are the junior members of a putravakasam tavazhi. The main allegations in the plaint are that the plaintiffs and defendants 2 to 12 were members of a putravakasam tavazhi that the second defendant was the karnavathi and manager of the putravakasam tavazhi and the third defendant, though the eldest son of the second defendant had never the karnavasthanam nor the right of management. The management of the properties was as specified in the gift deed granted by one K. Kuttiammo Haji the husband of the second defendant and was in the second defendant and not in the third who it is said lives in his wife's house. Then reference is made to a decree in S. C. S. No. 88 of 1934 on the file of the Subordinate Judge's Court of Tellicherry where defendants 2 to 4 in the present action were alone impleaded and it is stated that the present third defendant was impleaded therein as the karnavan of the putravakasam tavazhi, that the decree was passed with the third defendant as the karnavan and that as the third defendant was never the karnavan the decree does not bind the plaintiffs who are the other members of the tavazhi. The lower Court accepting the contention of the Court-fee Examiner held that the plaintiffs were bound to ask for the cancellation of that decree and that therefore they were bound to pay *ad valorem* court-fee on the amount covered by that decree. In a recent decision by a Full Bench of this Court in *Ramaswami* v. *Rangachariar*[1], one of the propositions laid down was that where a person was *eo nomine* a party to a decree whether he was a minor or a junior member of the family the decree passed in the suit binds him and his interests in the family property and that therefore he was bound to ask for a cancellation of that decree, that even if he did not ask for it in express terms it must be taken that he did ask for it and that he must be called upon to pay court-fees *ad valorem* on the amount of that decree. In a later decision in *Krishna Menon* v. *Calicut Bank*[2], Pandrang Row, J., held that even where a junior member of a tarwad was not *eo nomine* a party, if the person who is actually the karnavan was impleaded and a decree passed against the tarwad properties, the other members were bound by the decree passed in such a suit and that therefore a suit by a junior member would be

*C. R. P. No. 492 of 1942. 10th February, 1943.

1. (1940) 1 M.L.J. 32 : I.L.R. (1940) Mad. 259 (F.B.).
2. (1940) 2 M.L.J. 53 (Short Notes).

governed by the principle laid down by the Full Bench. This decision of Pandrang Row, J., was not fully reported, but was in a short-note in *Krishna Menon* v. *Calicut Bank*[1]. The lower Court purported to follow this short note of the decision and held that the plaintiffs were bound to pay *ad valorem* court-fees on the amount covered by the decree. Lower Courts are not entitled to rely upon short notes of decisions which are often incomplete and reliance on such short notes sometimes leads to great injustice. The present case is an illustration of this. In the case before Pandrang Row, J., the person who was admittedly the karnavan was impleaded in the prior suit and a decree was passed against the tarwad properties. In such a case, following an earlier decision of this Court in *Vasudeva* v. *Sankara*[2], the learned Judge held that if in a suit in which the person who was actually the karnavan was impleaded and a decree passed against the tarwad properties, that decree is one which needed setting aside at the instance of the junior members. Here the allegations in the plaint, which for this purpose must be taken as true, are that the third defendant was impleaded in the former suit as the karnavan of this putravakasam tavazhi, that the third defendant was not the real karnavan and that under the gift deed under which this putravakasam property was gifted the second defendant was given the right of management and that the third defendant had never the right of management vested in him. This is a very important distinction which the lower Court could not notice because it was not in the short note. The result is that the lower Court called upon the plaintiffs to pay a court-fee of Rs. 100 and they have had to come here to have the mistake rectified probably spending as much as the court-fee required to be paid by them. Lower Courts should not rely upon notes of recent cases. I find that the court-fee paid is sufficient and reverse the order of the lower Court. The lower Court will take the plaint on file and proceed to dispose of it according to law. There is no one against whom I can pass an order for costs in favour of the petitioners as this point was taken even before the issue of summonses to the defendants.

K.S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNASWAMI AIYANGAR.

S. R. Ramaswami Aiyar .. *Appellant** (*1st Defendant*)

v.

K. C. Saptharishi Reddiar .. *Respondent* (*Plaintiff*).

Indian Contract Act (IX of 1872), section 74—Clause in agreement for payment of double the amount payable in case of default by pattadar—Whether enforceable.

Where an agreement for the due maintenance of a village irrigation system provided that the *samudayam* lands were to be under the management of the respondent, but the kist due thereon should be paid by the several pattadars proportionately to the extent of the land in their respective pattas, in default of payment whereof by any pattadar the manager was given power to collect from the defaulting person double the amount which was payable by him, on the question whether this provision of the agreement was in the nature of a penalty from which a defaulting pattadar, can claim to be relieved,

Held, that the clause in question was penal in nature and was not enforceable. The *samudayam* manager was however entitled to reasonable compensation for the breach of undertaking committed by the defaulting pattadar in not paying his quota.

Analogy between kuri chit cases and cases like the present is not sufficient to extend the principle of the decisions governing the former to the latter.

Appeal against the decree of the Court of the Subordinate Judge of Trichinopoly in A. S. No. 300 of 1940 preferred against the decree of the Court of the District Munsif of Kulitalai in O. S. No. 115 of 1938.

T. V. Muthukrishna Aiyar and *K. G. Srinivasa Aiyar* for Appellant.

The Advocate-General (*Sir A. Krishnaswami Aiyar*) and *P. Chandra Reddi* for Respondent.

---

1. (1940) 2 M.L.J. 53 (Short Notes).
2. (1897) 7 M.L.J. 102 : I.L.R. 20 Mad. 129 (F.B.).

* Second Appeal No. 1457 of 1941. 5th February, 1943.

The Court delivered the following

JUDGMENT.—The maintenance in proper condition of the irrigation and drainage channels in a village is a matter of vital importance for the well being of the village community. The productivity of the land very largely depends on the supply in time of sufficient quantities of water, and this can only be secured by keeping the channels periodically cleared of accumulating silt. Every member of the village community is fully conscious of this need but unfortunately we find quite an appreciable number, of the smaller mirasdars in particular frequently evading their share of the common burden. The problem is sufficiently accute, in the Cauvery delta and it is time that the Government devised an effective remedial measure to meet the evil, the existing machinery being inadequate.

The difficulty appears to have been felt in the village of Seelaipillayarputhur in the Musiri Taluk as early as 1876 when we find, an agreement was entered into amongst the mirasdars of the village for the due maintenance of the village irrigation system and for the proper conduct of its common affairs. The agreement was embodied in the razinama decree passed in O. S. No. 9 of 1876 on the file of the District Munsif of Kulitalai, and appears to have been in force for a period of nearly 58 years. Experience during these years probably suggested that there was need for a revision and hence a fresh agreement Ex. B was entered into on 9th July, 1934.

The appellant is a pattadar holding lands in the village. The respondent is a leading mirasdar of the village, being the largest single owner therein. It was but natural that he should have been singled out and entrusted with the task of keeping the village channels in proper repair. By Ex. B he and his legal representatives after him were accordingly appointed managers for the several purposes therein mentioned. The funds necessary for enabling the respondent to carry out the repairs to the channels were derived from the following sources. There are the *samudayam* or the common lands in the village and there are also certain other common sources of village income, namely, those arising out of what has been described as the duck lease and the grass lease. The agreement provides that the *samudayam* lands should be under the management of the respondent, but the kist due thereon should be paid by the several pattadars proportionately to the extent of the land in their respective pattas. The proceeds of the duck lease and the grass lease to be realised by auctions held for the purpose, were to be divided into two moieties one moiety to be paid to the appellant for defraying certain common expenses of the village, the other moiety to be retained by the respondent. The income from these sources was to be supplemented by the payment by the several mirasdars to the respondent, sums of money calculated on the basis of one rupee for each acre of land.

The clause which has given rise to the present dispute is the following:

6. (*a*) The account of year ending with the 31st March of each year shall be printed and sent to all the pattadars before the 30th of the next April. Should the expenditure be greater than the amount collected according to the aforesaid account, the amount of tax for the current year and the amount due in proportion to the acreage, towards the amount of the excess expenditure, shall be together paid by every pattadar to the *samudaya* Manager Avergal (respondent), before the 15th May.

(*b*) Should the amount of expenditure be less than the amount collected, the amount becoming less in proportion to the acreage, shall be deducted from out of the amount of tax payable for the current year and the balance shall be paid to the *samudaya* Manager Avergal within the time specified above.

(*c*) In default of making such payment of the amount due before the 15th May of every year, the *samudaya* Manager shall have the power to collect, from the pattadar at default an amount which is twice the amount found due proportionately to each acre.

This clause contemplates the mirasdars paying an additional sum of money if the expenditure incurred by the respondent is greater than the amount collected

in the manner mentioned; but if it should be less, their contribution should be correspondingly reduced in the coming year. But the amount, whatever it is, has to be paid on or before the 15th May every year. In case of default the respondent as the *samudaya* Manager is given the power to collect from the defaulting pattadar double the amount which was payable by him should he fail to pay it in time. The appellant's contention in the Courts below, as it is here, was that this provision is in the nature of a penalty from which he is entitled to be relieved. This question has been decided against the appellant in the Courts below and hence he has preferred the second appeal.

The lower Courts while conceding that ordinarily a provision for the payment of twice the sum when default is committed by non-payment within the time limited, may be penal, have decided against the appellant on the ground that there is something so special in the nature of the agreement in question and the relationship created between the parties thereby that the Court is bound to hold that the contract is one falling outside the purview of section 74 of the Indian Contract Act. The special features are said to be (1) the manager has to spend a substantial sum between the 15th May and June and see that the breaches in the channels are all repaired and the silt cleared and the channel kept in proper condition to receive a regular flow of water from the main irrigation channel; (2) the work has to be done promptly and unless the pattadars pay the contributions regularly within the time stipulated the manager will find it very difficult to carry on the management. Such a provision is highly essential for carrying out the work entrusted to him. (3) The amount collected does not go into the pockets of the manager, but has to be credited in the accounts and would ultimately enure to the benefit of the mirasdars.

The substantial question that falls to be considered in this case is whether the provision for the payment of twice the amount when default is committed in the performance of the primary obligation is one in the nature of a penalty falling within section 74 of the Indian Contract Act. It may be that the contract under consideration is not one of an ordinary loan by one party to another. The obligation of the appellant arises out of his duty to contribute for a purpose which is common to himself and all the other mirasdars in the village. Nonetheless, it must be viewed—and this was expressly conceded by the Advocate-General—as a contract between the manager as the representative of the village community on the one hand and the individual mirasdar on the other. Nor can there be any doubt that *prima facie* a provision for the payment of double the proper amount in the event of a default is a stipulation by way of penalty. I am quite clear that this is a question for the Court to decide and not for the parties to agree about. On the facts of the case it does look as if the conditions necessary for the application of section 74 are all present unless of course the special facts—those adverted to above—warrant the conclusion that the provision in question is not a stipulation by way of penalty within the meaning of section 74. That, it seems to me, is the only way by which the respondent can succeed, if he can succeed at all. The only alternative is to regard the stipulation in the agreement as an exception to the section and that indeed was suggested. But I am definitely of opinion that the argument cannot be sustained on the language of the section which refers to one and only one exception and that is confined to a specified class of bonds executed for the performance of a public duty or act in which the public are interested.

The Courts below, and the respondent here, have relied on the line of cases decided in this Court regarding stipulations contained in bonds executed by the successful bidder to the stakeholder in the familiar *kuri* chit transactions which have frequently come before the Courts. There may be certain features which may at the first blush appear to be common to these transactions and the present. But the essential difference which is by no means negligible, is this; the stipulations in the *kuri* chit bonds are for the payment in lump and with interest of all the outstanding instalments if default is made by the successful bidder in the payment of any future instalment. But in no case had the Court to consider the enforceability of a stipulation for the payment of twice the amount, which is the case on

hand here. The general principle is not now open to doubt, and it has been ruled that the policy of the Legislature in enacting section 74 of the Contract Act is "that stipulations of the kind should not be enforceable in so far as they provide for more than reasonable compensation, and that we ought not to construe the word "penalty" narrowly or to be astute in finding reasons to take the case out of the section." Per Wallis, J., in *Muthukrishna Aiyar* v. *Sankaralingam Pillai*[1]. In the same case at page 265 Sundara Aiyar, J., made the following observations:

"What then is the real principle underlying the Court's interference with the contract between parties as to a payment to be made by way of damages? In my opinion it can be no other than this —the doctrine that the Court will carry out all contracts between parties is confined to the carrying out of the primary contract and does not extend to a secondary or subsidiary contract to come into operation if the primary contract is broken. In bonds securing the payment of money, the contract regarded as primary is the promise to pay the amount due to the creditor with the interest, if any, agreed upon. Any further contract, to be binding on the promisor if he breaks this contract, is regarded as a secondary one intended to secure the fulfilment of the primary contract; and the Courts both in England and in India do not feel bound to carry out such a secondary contract apart from its justice and reasonableness. This view has been laid down for too long a time to admit of question."

So far as I am aware these principles have never been departed from in this Court (vide *Ramakrishna Aiyar* v. *Venkata Somayajulu*[2]).

Before referring to the decisions relating to *kuri* chit bonds I should briefly indicate the main features of a *kuri* chit. The stakeholder, as he has heen called, is the chief organiser of the *kuri* chit and is the controller of the chit fund. The scheme is to collect from each of the *kuri* chit holders who are the subscribers to the chit fund, a specified sum of money called the share money payable periodically. The fund so collected is put up to auction among the chit holders and he who offers the highest discount gets the fund less the discount (which is distributed among the subscribers). The number of the chit holders, the period during which the fund is to run, the number of the instalments and the time of payment is generally fixed by the stakeholder and assented to by those who join the chit. The successful bidder has to bind himself to pay the future instalments and in the large majority of cases also furnishes security. The bond provides for the regular payment of the future instalments and also contains a covenant that if default is made the defaulted instalments should be paid together with interest at a rate which is generally high, within a further period of time, and if even by then the successful bidder does not pay the amount and interest, the entire future instalments should be immediately payable in a lump without reference to the original stipulation.

The question which has been debated is whether the stipulation for the payment of the future instalments in lump and the stipulation for the payment of interest are penal in nature, the argument being that the stakeholder is only entitled to recover the instalments which have actually fallen due perhaps with interest but not anything more. In *Vaithinatha Aiyar* v. *Govindasami Odayar*[3], Oldfield and Ramesam, JJ., held that such provisions are not penal. In coming to this conclusion the learned Judges laid emphasis on the special relation in which the stakeholder stands to the subscribers and the special necessity for the protection of his interest in view of the fact that he alone is liable to each subscriber, and there is no liability between the subscribers *inter se*. It was said that without punctual payment by individual subscribers the stakeholder could not discharge his obligation to the successful bidder and that it justified the imposition of stringent conditions on the defaulter. The question whether these stipulations are stipulations by way of penalty is certainly one for the Court to determine and it was determined in the negative on a consideration of the special features of chit fund transactions. In *Sankunni Menon* v. *The Empire of India Life Assurance Co., Ltd., Bombay*[4], Venkatasubba Rao, J., understood this case as laying down a principle

1. (1912) 24 M.L.J. 135: I.L.R. 36 Mad. 229, 250 (F.B.).
2. A.I.R. 1934 Mad. 31 (F.B.).
3. (1921) 42 M.L.J. 551.
4. (1931) 61 M.L.J. 388.

peculiar to chit fund transactions; for he observed:

"What may be construed as a penalty in the case of an ordinary loan, is not necessarily a penalty in the case of a chit fund transaction."

These two cases and certain others decided in this Court were reviewed by Ananthakrishna Aiyar, J., in *Kunju Nair* v. *Narayanan Nair*[1] and he came to the conclusion that the provision for the payment of all the future instalments in lump in case of default by the prize winner in payment of any instalment according to his bond, is not to be regarded as a penalty in itself. In this connection he referred to the decisions of the House of Lords in *Wellingford* v. *Directors, etc., of Mutual Society*[2] and the Court of Appeal in *The Protector Loan Co.* v. *Grice*[3] and of the Irish Court in In the matter of *O. B.—an arranging debtor*[4] and also to a passage in 13 Halsbury 152 and observed:

"In essence, the transaction before me is a loan of a common fund to one member. The member to whom the loan is to be advanced is selected either by casting of lots or by other means. The person who offers the highest discount is, in some cases, selected as the person entitled to the loan of the common fund. But the amount advanced to such member is a loan, and the common fund is lent to such subscriber in turn. As observed by Scotland, C. J., and Frere, J., in *Kamakshi Achari* v. *Appavu Pillai*[5], 'It is simply a loan of the common fund to each subscriber in turn'. . . . . It is really a debt *in praesenti* but to be paid by particular instalments if certain conditions be duly observed, but otherwise to be paid up at once irrespective of the benefit of time and instalments. It has been so viewed in this Presidency for a long time."

The principle which the learned Judge had in mind is that where a debt is made payable by instalments a stipulation that on non-payment of any instalment the entire debt shall become due is not in the nature of a penalty. The same question came up before Stone and Walsh, JJ., in *Raghavan Pattar* v. *Arumugham*[6]. The learned Judges accepted the conclusion of Ananthakrishna Aiyar, J., in *Kunju Nair* v. *Narayanan Nair*[1], but on a line of reasoning different from that which prevailed in the earlier cases. Stone, J., who delivered the judgment of the Court distinguished the decision in *Muthukrishna Aiyar* v. *Sankaralingam Pillai*[7], on the ground that it had reference to transactions which are in essence loan transactions and then observed:

"At the auction the person bidding the highest discount is regarded as a purchaser of the subject-matter of the auction. There is no reason we can see why a chit fund auction is different from any other auction save that as a rule what is sold is a present sum of money which is 'movable property' and not 'goods' within the meaning of the Contract Act, whereas at most auctions what is sold are goods, in the ordinary sense. But even a chit auction in some cases has as the subject-matter the sale of goods in the ordinary sense, *viz.*, rice and it seems to us clear that in essence the person who offers the highest discount and therefore becomes the owner of the chit fund is a purchaser at an auction and the contract is one of sale and not of borrowing. Different considerations may apply after the coming into force of the Indian Sale of Goods Act, 1930, which excludes money from this class of goods. As to this we express no opinion. The highest bidder purchases the chit by offering (1) the highest discount, (2) a bond for the future payments of instalments and these two things together constitute the consideration that he gives for the right which he buys immediately, the subject-matter of the chit. From that it seems to us to follow that it is irrelevant to consider, in determining whether the clause in the bond which he gives is a penalty or not, whether the amount of the chit that he buys and the amount of the instalments that he undertakes to pay are or are not the same."

This explanation puts a totally different complexion upon the nature of *kuri* chit bonds which according to the learned Judges is not to be regarded as a contract of loan but a contract of purchase.

In this view, no question, of penalty can arise, as the transaction is taken out of the operation of section 74 altogether. It was for different reasons that the learned Judges who decided the earlier cases had held that the section was not applicable. Those reasons were (1) the necessity for the protection of the stake-holder who stood in a special relation to the subscribers who were all bound together by common interests (*Vaithinatha Aiyar* v. *Govindaswami Udayar*[8]) and (2) the principle that where a debt is payable in instalments a condition by which

1. (1932) 65 M L.J. 29.
2. (1880) 5 A.C. 685.
3. (1880) 5 Q.B.D. 592.
4. (1917) 2 I.R. 354.
5. (1863) 1 M.H.C.R. 448 at 450.
6. (1934) 68 M.L.J. 283.
7. (1912) 24 M.L.J. 135: I.L.R. 36 Mad. 229.
8. (1921) 42 M.L.J. 551.

the debtor binds himself to pay the whole of the debt at once, if he commits default in the payment of any instalment is not a penalty, *Kunju Nair* v. *Narayanan Nair*[1]. It was urged that the position of the respondent in the present case approximates to that of the stakeholder in a *kuri* chit, and that the provision for exacting a double payment is essential for the satisfactory working of the agreement in the common interest. Otherwise it was said that the beneficent scheme underlying the agreement would be thrown out of gear and the well being of the entire village would be in jeopardy. I am alive to the force of the argument, and I am ready to confess that I would be prepared to go as far as the law permits to support such an agreement. But I am not able to convince myself that the stipulation in question is not a penalty. It seems to me that the respondent who is a man of position and wealth was chosen, because quite apart from the dominant interest he possesses in the village, he commands the necessary labour and finance to get the channel repairs made without waiting until the last pattadar has paid his quota. Secondly, I cannot get away from the idea that the provision for the payment of double the sum, cannot under any circumstances be anything but one *in terrorem*, to operate as a threat, to prevent a default. I can see nothing in common between such a stipulation and that occurring in *kuri* chit transactions except that a number of persons are interested in the due performance of the obligation. But this cannot justify the exaction of a double payment. Where is the limit to be drawn ? If community of interest is the deciding factor, one can make it treble, four times and so on. The more the amount to be paid in default, the greater will be the sanction, and all to the good of the community ultimately. But I regret I am unable to see sufficient analogy between the *kuri* chit cases and the present one, to extend the principle of the decisions in the former to the latter.

It was next argued that provisions in contracts of sale and purchase for the forfeiture of earnest or deposit money furnish a parallel, and instance an exception to the rule enacted in section 74. Whether this is so or not, it is not perhaps necessary to decide. But surely this class of decisions stands on a different principle altogether. The question was examined in a Full Bench decision of this Court in *Natesa Aiyar* v. *Appavu Padayachi*[2], where White, C.J., stated his conclusion and the reason therefor:

> "I also think that section 74, Contract Act, does not apply. The sum of Rs. 4,000 (this was the deposit money) is named in the contract as an 'advance' not as the amount to be paid in case of breach. Why should it be assumed that it was paid with a different intention from that stated in the contract? Further, if, as seems to me to be the right view, it is paid partly by way of part payment of the purchase money and partly by way of security or guarantee for the performance of the contract, it cannot be regarded as a sum named in the contract as the amount to be paid in case of breach. Again, if we are to deal with this case according to the letter of the section, this, as was pointed out by Miller, J., in the course of the argument, is not a question of the amount of compensation which the vendor is entitled to *receive* by reason of the breach, but a question whether the vendee is entitled, under the contract, to recover an amount which has been already paid."

For the reasons explained, I feel constrained however reluctantly, to decide the case against the respondent and hold that the clause in question is penal in nature and is not enforceable in terms. But the respondent is certainly entitled to reasonable compensation for the breach committed by the appellant in not paying his quota according to his contract. What that compensation should be has not been decided, and must now be decided. The appeal is therefore allowed. The decrees of the Courts below are accordingly set aside and the suit is remanded to the District Munsif with the direction that he will restore it to his file, enquire what is the proper amount of compensation to which the plaintiff is entitled in the circumstances; and pass a decree in his favour for the amount so ascertained. The appellant is entitled to his costs here and in the lower appellate Court.

Before concluding I must refer to the complaint of the learned advocate for the appellant that the observation of the learned Subordinate Judge that the evidence shows that the partition between the appellant and his son is only a make-believe affair is one for which there is no support whatever in the evidence.

1. (1932) 65 M.L.J. 29.
2. (1913) 24 M.L.J. 488 : I.L.R. 38 Mad. 178, 185 (F.B.).

I have not been referred to any evidence which can support the statement of the learned Judge. The appellant may be solely liable on the ground that the lands continued to stand in his patta and have not been transferred to the name of his son in the revenue registers in pursuance of the partition. But it was quite unnecessary to the learned Judge to consider whether the partition was valid or not and I agree that if the remark is allowed to stand it might create complications in future as between the appellant and his son. The respondent has not endeavoured to support this observation either. I therefore consider that it is entirely unfounded.

The court-fee on the memorandum of second appeal will be refunded.

K.C. *Appeal allowed and suit remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ABDUR RAHMAN AND MR. JUSTICE SOMAYYA.

The Dalmia Cement Company, Limited .. *Appellant** (*Defendant*)

v.

A. S. G. Lourdusami Pillai .. *Respondent* (*Plaintiff*).

Contract—Building contract—Tenders for construction of buildings by company—Acceptance of tender—Entire contract—Meaning of—Offer if general—Tender for construction using granite jelly—Subsequent scheme to use limestone jelly—Fresh proposal by company to contract with fresh terms—Effect to materially alter the original contract—Refusal of contractor to accept the new terms—Company carrying on construction through other contractors—If breach of contract—Power to deviate by way of addition or deduction—Effect of—Clause that if company do not require the whole or portion of the contract to be carried out, the contract could be determined—If authorises company to terminate the contract and give it to another.

Tenders were invited by the defendant company for the construction of a factory as well as subsidiary buildings in connection with their new cement works at Kalakudi and the works were to be carried out strictly in accordance with the schedule, specification and conditions attached to the tender. Works had to be carried out according to the terms under the supervision of the company's Works Manager and had to be completed within the time mutually agreed upon between the contractor and the Works Manager "when acceptance of a particular tender had been intimated to the tenderer". The tenderer had to submit a sum of Rs. 1,000 as earnest money along with the tender, which amount would be appropriated towards his security deposit if the tender were accepted by the company. The plaintiff's tender for Raw Meal Silos, Lepolin kiln, etc., was accepted and a security of Rs. 5,000 was fixed by the Works Manager and paid by the plaintiff. A lay out plan was sent by the company of Raw Meal Silos and the plaintiff began excavations in accordance with the contract. The original tender was accepted for construction by use of granite jelly for mass concrete, etc., but later the company wanted to alter it into limestone jelly and offered fresh terms to the plaintiff, to which the plaintiff would not agree. The change suggested would reduce the value of the contract to the plaintiff by 50 per cent. or more according to the prices suggested by the company. Before the work progressed far, the company entrusted the works to other petty contractors and had the works completed through them with the modifications suggested by the company. The plaintiff therefore sued the company for damages for breach of contract. Among other conditions the contract contained the following clauses:

"*Clause 22.*—The Works Manager shall have the power of deviating either by way of addition or deduction, from the drawings, specifications, bills of quantities, the value of all additions and deductions being ascertained by measurement and added or deducted from the amount of the contract price at the prices mentioned therein."

"*Clause 23.*—Should any work be ordered which cannot be priced on the basis specified hereinbefore, the prices to be allowed shall be settled previously to the execution of the order. In the event of a price being inserted in the order of the contractor it will be understood that he has accepted it unless he objects in writing to the same previous to the commencement of the work or delivering the articles or within six days from the receipt of the order, in which case he will be entitled to represent his case to the Works Manager."

"*Clause 25.*—If, at any time after the commencement of the work, the company shall for any reason not require the whole or a part thereof as specified in the tender to be carried out, the Works Manager shall give notice in writing to the effect to the contractor who shall have no claim to any payment of compensation whatsoever on account of proprietary or other advantage which he might have derived from the execution of the works in full, but which he did not derive in consequence of the full amount of the work not being carried out."

Held, (1) that this was a completed contract between the parties for the construction of such portion or portions of the defendant company's new cement works proposed to be built by them, as might have been given to the plaintiff either at or about the time when the tender was accepted or afterwards;

---

* Appeals Nos. 18 and 199 of 1941. 5th November, 1942.

(2) that the contract was a bilateral contract and that the defendant company must be held to have impliedly agreed that they would have the work of construction of Raw Meal Silos at least carried out by the plaintiff;

(3) that the contract was an 'entire contract' and the company was under an obligation to allow the plaintiff to complete the whole of the work.

Stewards & Co. v. *The Queen*, 17 L.T.R. 111, followed. Observations of Cockburn, C.J., in *Churchward* v. *Queen*, (1865) 1 Q.B.C. 173 at p. 195, applied.

(4) The power to 'deviate' in clause 22 either by way of addition or deduction did not mean addition or deduction from the contract in such a way as to result in the extinction of the original contract or to transfer it into one that was to all intents and purposes a new one. The deductions or omissions could only be such as are within the limits of the contract.

Rex v. *Peto*, (1826) 1 Y. & J. 38: 148 E.R. 577, followed.

(5) Clause 23 has no application to any work other than what has been mentioned in the first part of the clause itself.

(6) The words 'not required' in clause 25 were meant to convey a set of circumstances when the company did not intend to continue the contract on the ground that it did not require the whole or part of the building for which the contract was given to the plaintiff but could have no application to a case like this where they wanted those very buildings but built of a different material and at lower rates.

Appeals against the decree of the Court of the Subordinate Judge of Trichinopoly dated 4th November, 1940 and passed in O. S. No. 29 of 1939.

K. Rajah Aiyar, *D. Narasaraju* and *T. T. Srinivasan* for Appellant in Appeal No. 18 of 1941 and Respondent in Appeal No. 199 of 1941.

B. Sitarama Rao for *S. V. Venugopalachari* for Respondent in Appeal No. 18 of 1941 and Appellant in Appeal No. 199 of 1941.

The Judgment of the Court was delivered by

Abdur Rahman, J.—These are two connected appeals. They arise out of a suit for damages for breach of a building contract stated to have been committed by the defendant company in refusing to get a cement factory, or in any case, certain material portions thereof (and described as Raw Meal silos, workshops and stores and Lepol Kiln) constructed by the plaintiff. The plaintiff alleges that in response to a written invitation to offer for rates and terms at or on which persons who were willing to undertake the construction of a factory as well as subsidiary buildings to be raised in connection with the defendant company's new cement works at Kalakudi, Lalgudi Taluk (contained in a notice published by the latter and now embodied in the contract Ex. A) he submitted a tender on the 26th May, 1938, under his covering letter Ex. B along with a deposit of Rs. 1,000 that was required to be made with the tender. This was accepted by the defendant company on the 2nd June, 1938, and the rates given by the plaintiff in his tender form part of the contract (Schedule B). The plaintiff alleged in his plaint that he was to supply " all the labour and materials needed for the works specified in the drawings supplied as per clause 3 of the said agreement" and was required to make a deposit of Rs. 5,000, as

"the approximate cost of the work thus entrusted to the plaintiff amounted to Rs. 1,50,000"

in accordance with the terms of the agreement. He states that he made the deposit,

"entered on his duties and made all arrangements necessary for the carrying out of the work".

These consisted of, according to the plaintiff, constructing temporary sheds and other conveniences for a large number of workmen, getting the necessary materials, tools and plants, appointing technical staff necessary for the purpose and making advances to the workmen. The plaintiff states that after all this had been done and excavation work had proceeded for a few weeks, the defendant company's manager decided to substitute metal broken from limestone for granite stone and as no rates had been asked for or tendered in respect of such work, he suggested an unreasonable reduction in the rates which the plaintiff could not accept. The plaintiff asserts that from the discussion that took place between him and the servants of the defendant company and from their attitude he had reason to apprehend that they were trying to terminate the plaintiff's agreement on account of the offers

made by other contractors to do the work at lower rates. It is then stated in the plaint that while the plaintiff was continuing to do the work, he found that the foundations excavated by the plaintiff and the other works given to him were being filled with concrete and carried out by other petty contractors although 'the entire work' had, according to the contract between the parties to be done by the plaintiff for the due performance of which he had secured and maintained a large number of workmen at considerable cost in addition to the collection of all necessary tools and plant and large quantities of granite, construction of sheds and appointment of technical staff. He thus claimed a sum of Rs. 14,000 as damages for the breach of the contract and Rs. 2,666-14-3 for the work actually done by him. As the defendant company had paid Rs. 2,000 to the plaintiff for what he had done, a suit for Rs. 14,666-14-3 was instituted by him against the defendant company.

In their written statement, the defendant company did not deny that the plaintiff's tender to do certain work had been accepted by them but alleged that under the agreement between the parties, there was no obligation on their part to have any or all the works done through the plaintiff's agency and that they had the option to have such portion or portions of the works carried out as they or their authorised representative chose to do. They alleged that in pursuance of the plaintiff's agreement, the site for excavation of foundations of Raw Meal Silos, Lepon kiln workshop, etc., was marked out by their assistant engineer and the plaintiff was doing excavation work till about the first week of August, 1938; that while this work was in progress, the use of limestone jelly in place of granite stone was suggested by the head office for mass concrete in foundations and as aggregate in reinforced concrete work and that inasmuch as they were at liberty to make any alteration, addition or deviation in the contract, they informed the plaintiff of the change of the rates which they were prepared to pay for the limestone concrete in respect of which there was no mention in the agreement. It was denied on behalf of the defendant company that there was any "agreement as regards the rates for the substituted material, for mass concrete in foundations, etc." (which in fact the plaintiff did nowhere allege) or that they had committed any breach of the contract and were liable in damages. It was contended on their behalf that the plaintiff himself had in his letter dated the 6th August, 1938, recognised that the original contract had ceased to be operative and as in any case he did not continue further execution of work and violated the agreement, if one subsisted, the defendant company were justified in terminating the same and in employing other contractors for filling the excavated foundations. They alleged that the amount actually payable to the plaintiff for the work done by him was Rs. 1,822-9-0 but to obviate an unnecessary dispute they had paid a sum of Rs. 2,000 instead.

The learned Subordinate Judge held that the contract Ex. A could not be considered to be merely an offer on the part of the plaintiff with liberty to the defendant company to get any work done by the plaintiff but it was definitely a contract with right to the defendant to drop any portion of the work and since the work to be done by the plaintiff was of the approximate value of a lakh of rupees consisting of three major items, that is, of Raw Meal Silos, Workshop stores, Lepon kiln and not for only such work for excavation of foundations as was suggested by the defendant company to the plaintiff, he found the defendant to have been guilty of a breach of contract but as there was another contractor Kriparam who had been given a portion of the contract, he was of opinion that the probable amount of the value of the work of the plaintiff would have been about Rs. 50,000 and since the work of the value of Rs. 2,000 had been done, he assessed the damages, after adding Rs. 120 on account of two months' pay of a supervisor, at Rs. 4,920, and granted a decree for the same with interest at six per cent. Both the parties have appealed against this decision. The defendant company claims that no decree should have been passed against them in the circumstances while the plaintiff asks for the balance of the amount which was not decreed in his favour.

As the liability of the defendant company or the rights of the plaintiff can only be adjudicated on the basis of the contract Ex. A, of which, the invitation to tender made by the plaintiff, the acceptance by the defendant company, the terms and the conditions of the contract mentioned therein form a part, it is necessary to examine it carefully before the other documents and evidence are considered.

Tenders were invited by the defendant company for the construction of factory as well as subsidiary buildings in connection with their new cement works at Kallakudi and the works according to the notice of tender were to be carried out strictly in accordance with the schedule, specification and conditions in what were described as contract documents attached therewith. Works had to be carried out according to its terms under the supervision of the works manager and had to be completed within the time mutually agreed upon between the contractor and the works manager "when acceptance of a particular tender had been intimated to the tenderer". The tenderer had to submit a sum of Rs. 1,000 as earnest money along with the tender, which amount had to be appropriated towards his security deposit if the tender were accepted by the defendant company.

It was suggested by learned counsel for the defendant company that the term 'work' used in this tender did not refer to 'the construction of factory as well as subsidiary buildings' but only to such of the parts of the works in regard to which the acceptance of the tender was communicated to the tenderer from time to time. According to him the tender, even when approved, was to be something in the nature of a standing offer and had to be accepted by the defendant company with regard to every bit of work that was subsequently given to the contractor.

This notice of tender was sent by the plaintiff with his covering letter Ex. B on the 26th May, 1938. This letter contained nothing of any importance except that it clearly shows it was a tender "for the construction of cement factory and subsidiary buildings of the company" and conveyed the plaintiff's willingness to "remit the amount of tender deposit for this work."

The notice of tender issued by the company was, as stated before, accompanied by a contract form. Since the tender made by the plaintiff was accepted and forms the actual contract between the parties, we must now turn our attention towards the same. In the beginning of this document, there is what was described by Mr. Rajah Aiyar, learned counsel for the defendant company, a preamble. Emphasis was laid by him on the words 'or a portion thereof' used in this preamble and it was contended that even if the offer made by the plaintiff is found not to be in the nature of a standing offer, the defendant company were, in any case, free under the words of this contract to give either the whole of the work or 'a portion thereof' and could not be held guilty of any breach even if they did not finally choose to give the whole of the contract but only a portion thereof. Learned counsel for the plaintiff contends, on the other hand, that it was not an one-sided contract and the plaintiff's tender of acceptance could not be regarded in the nature of a standing offer. Moreover, according to him, in consequence of what happened either at the time of the acceptance of the offer or shortly after, that is, the demand of a security deposit of Rs. 5,000 under the conditions of the contract—the choice by the defendant company had been made and the work agreed to be constructed by the plaintiff specified.

We must, in view of these contentions, first of all determine whether after the acceptance of tender, the plaintiff's offer to construct certain buildings mentioned in Ex. A continued to remain in the nature of a standing offer—open and one-sided—which could be converted into a definite contract to build only after a specific order by the company to build any definite portion or portions was given and if we come to the conclusion that a bilateral and a completed contract had come into existence, the extent of that contract.

Our attention was drawn in this connection by learned counsel for the defendant company to Halsbury's Laws of England (Hailsham), Vol. VII,

paragraph 117, page 84 (tenders), to the decisions in *Burton* v. *The Great Northern Railway Co.*[1], *The Great Northern Railway Company* v. *Witham*[2], *The Queen* v. *Damers*[3], *Percival Lim.* v. *London County Council Asylums and Mental Deficiency Committee*[4] and the *Secretary of State* v. *Madho Ram*[5]. Mr. Sitarama Rao, learned counsel for the plaintiff, distinguished these cases on the ground that no contract, express or implied to get it performed could be, in these cases, said to have come into being. He relied, on the other hand, on the provisions of Ex. A and on the correspondence between the parties which, according to him, clearly pointed to a definite bilateral and 'entire' contract between the parties. At all events, he contended that even if the contract on the face of it appeared to be binding and obligatory upon his client alone, yet there were cases and occasions on which a corresponding and correlative obligation on the part of the other party—in this case the defendant company—must be found to have been implied. He relied on Addison's Law of Contract (11th Edition, pp. 446, 447), the decisions in *Thorn* v. *The Commissioners of Public Works*[6], *Churchward* v. *The Queen*[7], *Tancred, Arrol & Co.* v. *The Steel Company of Scotland, Limited*[8] and *Ford and others* v. *Newth*[9].

Having gone through these authorities, we find that the cases relied on by the learned counsel for the defendant company cannot be held to apply to the facts of the present case. In the case of *Burton* v. *The Great Northern Railway Co.*[1] the plaintiff had undertaken to provide all waggons, horses, etc., necessary for the cartage of grain, merchandise, etc., between Hatfield and Ware and to convey what were presented to him for that purpose, between the above points at a stipulated rate. The agreement was to continue for a period of twelve months. The Railway Company, however, served the plaintiff with a notice that the arrangement entered into between them and the plaintiff would cease from a certain date. This was because they had leased a portion of this land to another Railway Company and had bound themselves not to carry between Hatfield and Ware. On a suit for damages brought by Burton, it was held that there was a unilateral agreement and that:

"the agreement did not raise an implied covenant that the defendant company would employ the plaintiff during two or three years although the defendant was bound by express words to pay the plaintiff the stipulated wages during those periods respectively if the plaintiff performed or was ready to perform the condition precedent on his part."

The form of the agreement would show that the railway had nowhere bound themselves to present the grain, merchandise, etc., for cartage and the notice could not but have been, in the circumstances, regarded as a matter of courtesy alone which they were in no way bound to give. Similarly in the case of *The Queen* v. *Damers*[3], Lord Macnaghten who delivered the judgment of their Lordships of the Privy Council on appeal from the judgment of the Superior Court at Quebec observed as follows:—

"There is nothing in the contract binding the Government to give to the respondent all or any of the printing work referred to in the contract, nor is there anything in it to prevent the Government from giving the whole of the work, or such part as they think fit, to any other printer."

Evidently the terms of the contract in that case did not permit an inference of implied obligation on the part of the Government to be drawn. As for the third English decision, *Percival Lim.* v. *London County Council Asylums and Mental Deficiency Committee*[4], the facts were that a firm of contractors had signed a tender addressed to the Asylums Committee of the London County Council whereby they had undertaken on the acceptance of the tender to supply all or any of the goods mentioned in the schedule if, and to the extent, the same should be ordered by the Committee, and in any quantity. The probable requirements for the period of the contract were stated in the schedule but the Committee had the option to require the supply and delivery of goods in excess of the quantities in each

1. (1854) 96 Rev. Rep. 811.
2. (1873) 9 Com. Pleas 16.
3. (1900) A.C. 103.
4. (1918) 87 L.J.K.B. Rep. 677.
5. (1928) I.L.R. 10 Lah. 493.
6. (1863) 32 Beav. 490 : 55 E.R. 192.
7. (1865) 1 Q.B. 173.
8. (1890) 15 A.C. 125.
9. (1901) 1 Q.B. 683.

schedule. The eleventh condition in the contract was as follows:

"Nothing contained in this contract shall be held to restrain the committee from contracting with persons other than the contractor for the supply of any of the goods described or referred to in this contract, if they shall in their discretion think fit to do so, but the committee will not exercise this power so long as the contractor satisfactorily carries out all the conditions of his contract, except in case of emergency or of unforeseen circumstances."

The Committee did not require the quantity specified in the schedule annexed to the tender form and the contractors claimed that they were entitled to supply goods to the full amount specified. Atkin, J., who delivered the judgment of the Court, was of opinion that the contract was not a firm contract to take the whole of the goods that were required. He pointed out that the question whether there was a firm contract between the parties or whether the tender was of a nature that even if accepted the purchasing body was not bound to give the tenderer any order at all depends entirely on the form of the contract. In the latter case, the contractor would, according to the learned Judge, be taken to merely offer to supply goods at a price and would be under an obligation to supply the goods in accordance with the order if the purchasing body chose to give him an order for the same within a stipulated time; but apart from that nobody was bound. He pointed out that there was an intermediate contract that could be made in such a way as not to bind the parties to supply or purchase any specified quantity, but to bind the purchaser to pay for such goods as in fact were needed and ordered by them. As the tenders in that case had made it plain that the purchasers were under no obligation to order any of the goods and the tenderer was, on the other hand, under an obligation to deliver the goods specified in the tender as and when he got orders from the London County Council there was no firm contract under which the purchasing body had undertaken to buy all the specified goods from the contractor. In *Secretary of State* v. *Madho Ram*[1] the plaintiff had agreed on acceptance of his tender to supply and deliver so much oil as the Military authorities of Lahore might require. The learned Judges of the Lahore High Court, on a construction of this contract and after adverting to the decisions in *Percival Lim.* v. *London County Council Asylums and Mental Deficiency Committee*[2] and other decisions came to the conclusion that there was nothing in the contract which could have bound the Government to give to the plaintiff any order to supply the oil and that the tender made by the plaintiff and accepted on behalf of the defendant merely created a series of continuing offers which they were at liberty to convert into contracts by giving orders in accordance with the terms of the tender. It might be mentioned that this decision was taken up in appeal to the Privy Council but their Lordships abstained from going into this question and disposed of the case on a different point altogether.

Mr. Sitarama Rao, learned counsel for the plaintiff, contended as observed already, that an 'entire contract' (in the sense which that term is used in building contracts for which *see* Halsbury, Vol. III, paragraphs 357, 366) had been given to his client and that the company was under an obligation to allow him to complete the whole of the work. We have already referred to the various authorities on which he relied in this connection. The first decision which he cited in support of his contention was in *Thorn* v. *The Commissioners of Public Works*[3], where it was held that a contract alleged to be wholly one-sided could not be, although possible, "supported without express words". That Courts would lean against such a construction as far as possible can be inferred from the decision of the Court of Appeal in *Stewards & Co.* v. *The Queen*[4], where on the acceptance by the Admiralty of a tender for the supply of 2,000,000 tons of such quantity of refuse stone for the construction of breakwater, the contract was construed to cover 2,000,000 tons of refuse stone or thereabouts and the contention that there could be no breach of contract if the Admiralty did not require the stones at all was repelled. As to the question that in a case like the present, the corresponding and correlative obliga-

1. (1928) I.L.R. 10 Lah. 493.
2. (1918) 87 L.J.K.B. Rep. 677.
3. (1863) 32 Beav. 490: 55 E.R. 192.
4. (1900) 17 T.L.R. 111.

tion on the part of the company must be held to be implied, Mr. Sitarama Rao relied on the observations of Cockburn, C. J., in *Churchward* v. *The Queen*[1] which were as follows :—

"Where the act to be done by the party binding himself can only be done upon something of a corresponding character being done by the opposite party, you would there imply a corresponding obligation to do the things necessary for the completion of the contract."

The decision of the House of Lords in *Tancred, Arrol & Co.* v. *The Steel Company of Scotland, Limited*[2], need not detain us very long. The tender in that case was for the supply of the whole steel required for the Forth Bridge less 12,000 tons of plates and although the estimated quantity of steel was to be "30,000 tons more or less", the contract was, in that case, held to be for the whole of the steel required and not merely for "30,000 tons more or less", as was contended on behalf of the tenderer. The existence of a binding contract was conceded by the parties.

The question whether the advertisement, tender and acceptance constituted a complete contract between the Municipal Corporation of Gloucester and Newth came up for consideration in *Ford* v. *Newth*[4]. The tender was in the following words:

"I hereby offer to supply for the twelve months ending 31st December, 1900, the undermentioned goods as required, the best of their respective kinds, and to the entire satisfaction of the city surveyor delivered at the corporation depot, Stroud Road, Gloucester, in guaranteed makers, drums or barrels sealed down."

This tender was accepted. When the question arose whether this constituted a binding contract between the parties, it was held by the learned Judges that there was an obligation on the Municipal Council to order from the respondent such of the goods included in his tender as the Council might require in the period of twelve months and that the Council could not be justified in treating this tender as a mere price list and ordering the goods from any one whom they chose.

After examining the whole of the contract (which includes the tender, the acceptance, the conditions and other provisions contained in Ex. A), we are clearly of opinion that it was a completed contract between the parties for the construction of such portion or portions of the defendant company's new cement works, proposed to be built by them at Kallakudi, as might have been given to the plaintiff either at about the time when the tender was accepted or afterwards. This did not mean, as learned counsel for the company would have us understand, that the contractor on his part would remain bound to complete the full and entire works and to render all the services required:

"in the execution of the construction of the Cement factory buildings with the subsidiary buildings, etc.,"

but the company would be free even after accepting the tender and requiring him to furnish security to the extent of Rs. 5,000, which they seem to have done, to give him a work of the value of either one lakh of rupees or one rupee. The preamble did not only mention that the sum of Rs. 1,000 was "hereby forwarded as earnest money" but that this sum would be forfeited by the contractor if he did not deposit the full amount of security amounting to Rs. 5,000 in accordance with the first condition of the contract. This would clearly show that the sum of Rs. 5,000 must have been demanded on behalf of the defendant company and agreed to be paid by the contractor after the tender was accepted and before the contract was signed on the 2nd June, 1938. How this sum was arrived at would be clear from the first condition of the contract. It might be mentioned here that according to the only witness examined on behalf of the defendant company, the security of Rs. 5,000 was fixed by the works manager obviously after the acceptance of the tender. This would show that the parties understood the value of the contract of construction, that was being given to the plaintiff to be about a lakh of rupees.

Whatever might have been said if no drawings and specifications of the proposed building were, as referred to in the third and the fourth clauses of chapter I

1. (1865) 1 Q.B. 173 at 195.
2. (1890) 15 A.C. 125.
3. (1901) 1 Q.B. 683.

(Preliminary and General) given to the plaintiff, a reference to the lay out plan (Ex. C and Ex. C-1, both of them being parts of the same plan) in Ex. D shows that the company had clearly placed an order with the plaintiff to construct the Raw Meal Silos on or before the 4th June, 1938. The letter Ex. I written by the works manager on the 7th June, 1938, clearly supports this conclusion. In that letter, there is a clear reference to the plaintiff having been already *"instructed to construct"* the Raw Meal Silos. Mr. Rajah Aiyar made an attempt to show that the underlined words referred to the work of the excavation only that had been given to the plaintiff but as excavation could not have been asked to be constructed by a person in the position of the works manager who must be presumed to be fully acquainted with the building terms. We had no difficulty in repelling that contention. But even if this letter were not there or its construction would not have been as clear as it now is, we have no doubt in our minds that the contract Ex. A was a bilateral contract and that the defendant company must be, in any case, held to have impliedly agreed that they would have the work of construction in regard to Raw Meal Silos at least carried out by the plaintiff. The delivery of drawings referred to in Ex. D can lead us to no other conclusion. This is in addition to such other works for which a definite order may be found to have been given subsequently.

Had these been the only questions with reference to the contract that we were called upon to decide, it would have been unnecessary to refer to the various other conditions which form a part of this contract. But since a great deal of argument has centered round the construction of the 22nd, 23rd and 25th conditions, it would be just as well to refer very briefly to the other relevant conditions. They also support the above conclusion.

The first condition of the contract relates to the security deposit which the contractor had to pay. The words " the security for due performance of the said contract if accepted, shall be the sum not exceeding five per cent. of the total value of the works to be executed by the contractor " are important. Learned counsel for the defendant company would however contend that the words ' if accepted ' did not lead to the inference that any definite contract to build any definite portion of the cement factory had come into existence by the company's acceptance of the tender but rather to the conclusion that the offer had to be accepted later when the company asked the contractor to execute any particular work. If we remember, however, that all these contracts along with the conditions were issued long before any tender was even made by any tenderer and that the security for the due performance of the contract could only have been deposited by the contractor after the tender was accepted and the contractor was asked to make a deposit for any sum not exceeding five per cent. of the total value of the works to be executed by the contractor, it would be clear that by the time that a demand of Rs. 5,000 towards the security deposit was made a definite contract for the purpose of construction of buildings must have come into being and the parties must have very clearly understood that the plaintiff was being called upon to construct buildings of the value of a lakh of rupees or more. Even at five per cent. which was the maximum that could have been demanded, the approximate cost of the building to be constructed would have been a lakh of rupees.

The second condition in the contract provided that it was to include all labour, materials (except cement, steel, bricks, etc., specified in schedule A which were to be supplied by the company and chargeable to the contractor at the prices mentioned therein).

According to the third condition, one set of drawings of the building that the contractor was called upon to construct was to be supplied by the defendant company to the contractor and this along with the specifications, was to be binding on the parties: This was, as found before, given to the plaintiff in respect of Raw Meal Silos.

Under the fourth condition of this contract, " all temporary buildings, stagings, railways, tramways, machinery and plant provided by the contractor for the construction of the works " were to become the property of the company until the

contractor completed the works under this contract. Although not very important by itself, this condition gives a fairly good clue, in our opinion, to the magnitude of the work that the contractor was called upon to execute. A condition like this would not have found a place in the contract if the defendant company were to have the option, as argued by their learned counsel, of giving a petty contractor, of asking the plaintiff to construct a very insignificant portion of their cement factory.

Under the eighth condition, no foundation was to be laid by the contractor unless excavations had been examined by the works manager and the former had obtained the latter's approval in writing.

We may then pass on to the 18th condition which required the contractor to make his own arrangements in regard to temporary sheds for the accommodation of his labour, latrines and sweepers, etc., and under which he could only remove such sheds and staging on completion of the works.

Then we may come to one of the most important conditions (condition 22) on which very great emphasis was laid by the learned counsel for the defendant company. The first sentence of it which is material reads as follows :—

"The Works Manager shall have the power of deviating either by way of addition or deduction, from the drawings, specifications, bills of quantities, the value of all additions and deductions being ascertained by measurement and added or deducted from the amount of the contract price at the prices mentioned therein."

Learned counsel for the defendant company contends that according to this condition the works manager was authorised to make any deviation from the drawings, specifications, etc., as he liked and had complete power of addition or deduction. Mr. Sitarama Rao, learned counsel for the plaintiff, contends on the other hand, that the power to deviate either by way of addition or deduction was to be confined to those works alone whose value could be added or deducted from the amount of the contract price at the prices mentioned therein and that the works manager, or for the matter of that any one else, had no power to add or deduct from the contract in such a way as could have resulted in the extinction of the original contract or of its transformation into one that was to all intents and purposes a new one and the identity of the old one would be changed out of recognition. It might have been possible, according to him, for the defendant company to add to or deduct certain items of work from the contract but it could not be varied under this clause in the manner suggested by the works managers as prices of the substituted work were not mentioned in the tender which had been made and accepted. He also urged that it was not possible for the company under the terms of the contract to alter the materials with which the buildings were to be constructed. Nor could the company, he argued, vary the contract materially. The company might have been entitled to add to or deduct from the contract but they could not, he contends, deduct *and* add and thus vary the same. Deductions or omissions had, according to him, to be within the limits of the contract. In short, according to Mr. Sitarama Rao, a material or substantial variation of the contract such as suggested by the company was neither provided for nor contemplated and could not have been effected. He relied in this connection on the law as stated in Halsbury (Hailsham), Vol. III, paragraphs 476 and 477, Hudson on Building Contracts, at page 438 (Vol. I, 4th edition) and on the decision in *Rex* v. *Peto*[1]. A reference to *Richards* v. *May*[2] in Hudson's book is not material on the point that we are just now considering.

In construing two clauses of a contract one of which contained a provision as to "addition to or omission of the works so contracted to be proposed and executed" and the other as to the "drawings that may be provided during the progress of the work," Alexander, C. B., observed at page 583 in *Rex v. Peto*[1] that,

"In sound construction, it should be limited to that to which the condition has confined it, namely, to such extra works as may be done, or something which is to be omitted ; but it cannot refer to the substitution of one thing for another, more especially anything so important as the making the foundation on which the whole validity and security of the building depends. There is another clause which has been mentioned ; that which refers to the detailed and working drawings that may be provided

1. (1826) 1 Y. & J. 38 : 148 E.R. 577. 2. (1883) 10 Q. B. D. 400.

during the progress of the work. Is it not a most violent strain to consider this clause as affording, an authority for doing that which is totally subversive of the original scheme?"

Similarly Halsbury states the law in paragraphs 476 and 477 (Vol. III) in the following words :

"476. If additional work is of such a nature as to be entirely outside the contract, it does not come within the clause relating to extras at all, and is not subject to any of the stipulations of the contract."

"477. A power to order alterations, additions, or omissions in the contract will not extend to permit the architect or engineer to change the whole scheme of the work and turn it into something entirely different from that contracted for. Where mere additions are made to a building, the contract still exists, but where the work is varied to such an extent that it is impossible to trace the contract at all, the contract must be treated as abandoned, and the work as having been done under an implied contract to pay by measure and value."

Bearing the words of the present contract in mind, there appears to be no doubt that this clause (clause 22) was not intended to provide for such a variation as the defendant company wished to effect and which would reduce the value of the contract to the plaintiff by 50 per cent. or more, if the prices suggested by the defendant company could be taken to give any indication of that fact. The deductions or omissions could only be within the limits of the contract and there could not be such a substantial variation as was proposed by the plaintiff company of substituting the use of limestone jelly in place of granite stone for mass concrete in foundations and as aggregate in reinforced concrete work.

The 23rd condition of the contract lays down the limits within which the works manager could supply his own material for any special fittings and workmanship, etc. There is a distinct sub-clause in this condition which reads as follows :—

"Should any work be ordered which cannot be priced on the basis specified hereinbefore, the prices to be allowed shall be settled previously to the execution of the order. In the event of a price being inserted in the order of the contractor it will be understood that he has accepted it unless he objects in writing to the same previous to the commencement of the work or delivering the articles or within six days from the receipt of the order, in which case he will be entitled to represent his case to the Works Manager."

Mr. Rajah Aiyar contends that this clause has to be read as an independent clause and must be taken to provide for all cases when a particular work ordered "cannot be priced on the basis specified hereinbefore", or, in other words, as to which the rates are not to be found in the tender. If this clause were not so construed various complications, he contends, are bound to arise and it may be, as happens to be the case now, that the prices of new or altered works are not to be found in the accepted rates. We do not however feel impressed by that contention. If the parties did not contemplate the introduction of any fresh work which was not provided for in the tender and did not make a contract as to what was to happen if any such contingency arose and a work not included in the tender had to be carried out, they have themselves to thank for. We cannot make out a new contract for them. If such work had been ordered and done, the rates would have to be settled by the Court according to law. But this cannot justify us in tearing a portion of the clause out of its context and in reading the sub-clause independently of clause 23 of which it forms a part. We must, therefore, hold that this sub-clause could have no application to any work other than what has been mentioned in the first portion of the 23rd clause itself. The last clause in this contract on which emphasis was laid by the learned counsel for the defendant company was the 25th clause which reads as follows :—

"If at any time after the commencement of the work, the company shall for any reason not require the whole or a part thereof as specified in the tender to be carried out, the Works Manager shall give notice in writing to the effect to the contractor who shall have no claim to any payment of compensation whatsoever on account of proprietary or other advantage which he might have derived from the execution of the works in full, but which he did not derive in consequence of the full amount of the work not being carried out."

Learned counsel for the defendant company contends that the defendant company was entitled under this clause to stop the execution of the whole or a part of the works specified in the tender if it did not require the same to be carried out and the plaintiff was precluded under this clause from claiming compensation on account of any "advantage which he might have derived from the execution of the works in full." Mr. Sitarama Rao, on the other hand, contends that this clause could only

have application if the defendant company had ceased to 'require' the whole or part of the work but would have no application if their requirements continued to subsist and they got the work carried out by some one else. According to him, this clause could only be operative if the company had by any chance decided to drop or abandon the whole or any portion of the works for which the contract had been given to the plaintiff and that they could not take shelter behind this clause and commit a breach of the contract by getting the work given to the plaintiff, carried out through other agencies. It is not disputed that the defendant company had the works, with the modification suggested by them, executed by other contractors.

According to what is stated in paragraphs 358, 363 and 373 of Halsbury's Laws of England (Hailsham) "if a builder or contractor undertakes to erect the whole of a specified building or work in accordance with the specification "," for a price to be subsequently ascertained on some fixed basis, *e.g.*, by a schedule of prices," the contract is entire and " the employer is under an obligation to allow the contractor to do the whole of the work." The law is then stated as follows :—

> " The contractor, it would seem, is entitled (subject to any special circumstances or stipulations in the contract) to uninterrupted possession of the site for the purpose of carrying out the works in the contract. He can therefore object to a fresh contractor being brought upon the site while he is carrying out the contract works. The employer cannot, it would seem, take advantage of a stipulation authorising him to omit work in order to get parts of the contract work executed by another contractor while the contract is proceeding. It has been decided in America that such a clause does not contemplate or authorise the omitting of work given to another contractor (*Gallagher* v. *Hirish*[1])."

The same case is referred to by Hudson in his work on Building Contract at page 74. If clause 25 is construed in accordance with what has been stated in the abovementioned authorities and really in spite of them, there is no manner of doubt that the words 'not required' in it were meant to convey a set of circumstances when the company did not intend to continue the contract on the ground that it did not require the whole or part of the building for which the contract was given to the plaintiff but could have no application to a case like the present one where they wanted those very buildings but built of a different material and at lower rates. This concludes the relevant conditions to which reference was made during the arguments by learned counsel for the parties.

* * * * *

[After referring to the contract and the correspondence, their Lordships continued:—] Our conclusion from the various terms of the contract and the correspondence that we have referred to is that the plaintiff had been asked to construct Raw Meal Silos and to execute certain other minor works in regard to which the letters were given to him and the execution of contracts in regard to other major works were not actually placed with him.

From what we have stated to be the terms of the contract between the parties it would follow that the breach was committed by the defendant company.

* * * * *

The only question that now remains to decide is that of damages. We have already come to the decision that having regard to the fact that the sum of Rs. 5,000 demanded from and paid by the plaintiff by way of security deposit, the work given to him was to be of the value of a lakh of rupees approximately. Out of this work, the order for the construction of Raw Meal Silos had been given to the plaintiff and the excavation work in regard to its foundations had been carried out by him. This work could not proceed any further as the breach by the defendant company went to the root of the contract and the contractor elected not to proceed with the work. In such circumstances, the measure of damages would be the amount of profit which the contractor would have made if he had been permitted to do the work in addition to, of course, what was due to him for the work actually done.

* * * *

The plaintiff would be therefore entitled to damages for the breach of contract on the basis that the work to be done by him was to be of the approximate value of rupees one lakh out of which a definite order in regard to Raw Meal Silos had been

1. (1899) N. Y. 45, App. Div. 467.

placed by the defendant company. * * * * * * But the difficulty in our way is that out of three major items given to the plaintiff, the only definite contract in regard to major works that was placed with him was of the construction of Raw Meal Silos only. It is true that this work was individually greater in proportion than the other works that were meant to have been given to the plaintiff but unfortunately for him there is no definite evidence on the record as to what proportion this work, *i.e.*, the construction of Raw Meal Silos bore to the other works. In the absence of any evidence that the contract to construct Raw Meal Silos was larger than the other works, we think on the whole that the valuation of that contract might be justly placed at Rs. 50,000. Calculating damages then at 10 per cent., the plaintiff would be entitled to Rs. 5,000 (five thousand) out of which he must have already made Rs. 200 out of the work that he had done. He would thus be entitled to recover a sum of Rs. 4,800 only. We would therefore pass a decree in his favour for this amount. The lower Court had awarded interest on the damages decreed not from the date of the suit but from a prior date. This was wrong. No interest could have been, in the absence of any agreement or perhaps in the absence of commercial usage to that effect, awarded on any damages prior to the date of the suit. We would therefore modify the order of the trial Court in regard to interest and award it on the sum decreed from the date of the institution of the suit at six per cent.

The result is that the appeal by the defendant company (Appeal No. 18 of 1941) substantially fails and is, subject to the modification ordered above, dismissed with costs. The appeal by the plaintiff (Appeal No. 199 of 1941) also fails and is dismissed with costs.

S.V.V. ——— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PATANJALI SASTRI.

Gaddam Padmanabham .. *Petitioner**

v.

Pasupuleti Kamaraju and others .. *Respondents.*

Government of India Act, 1935, section 205—Question raised whether Act (IV of 1938) was ultra vires *the Provincial Legislature in so far as it affected Negotiable Instruments—Question in the form not raised in appeal in High Court—Certificate when could be granted.*

The petitioner applied under section 205 of the Government of India Act, 1935, after the disposal of the case, for a certificate that the case involved a substantial question of law as to the interpretation of that Act, the question proposed to be raised before the Federal Court being whether Madras Act IV of 1938 in so far as it purported to affect debts due under Negotiable Instruments was *ultra vires* the Provincial Legislature.

Held, that the question not having been raised and decided in the proceedings of the High Court, no certificate under section 205 could be granted.

The question having been decided by the Full Bench in *Nagaratnam* v. *Seshayya*, (1939) 1 M.L.J. 272 : I.L.R. (1939) Mad. 151 (F.B.), if any further appeal was contemplated, the point should have been mentioned as being still a live issue between the parties, though it would have been decided in accordance with the judgment of the Full Bench.

Petition praying that in the circumstances stated therein the High Court will be pleased to grant the petitioner herein a certificate under section 205 of the Government of India Act, in S. A. No. 1221 of 1940, preferred to the High Court against the decree of the Court of the Subordinate Judge of Cocanada in A. S. No. 132 of 1939 (O. S. No. 182 of 1938, District Munsiff's Court, Peddapuram), that the said case involves a substantial question of law as to the interpretation of the Government of India Act, 1935.

G. Balaparameswari Rao for Petitioner.

K. Bhimasankaram for Respondents.

The Court made the following

ORDER.—The second appeal out of which this petition arises was dismissed on the 16th July, 1942. Leave to appeal under the Letters Patent was also refused.

*C. M. P. No. 105 of 1943. 22nd January, 1943.

The petitioner who was the appellant now applies under section 205 of the Government of India Act, 1935, for a certificate that the case involves a substantial question of law as to the interpretation of that Act.

The question sought to be raised before the Federal Court is whether the Madras Agriculturists' Relief Act is, in so far as it purports to affect debts due under Negotiable Instruments, *ultra vires*, the Provincial Legislature. This question arose for consideration in another case and was answered in the negative by a Full Bench of this Court (see *Nagaratnam* v. *Seshayya*[1]). In view of that decision both the Courts below in the present case overruled the petitioner's contention that the promissory note on which he brought the suit was not affected by the Act. No such question, however, was raised before me at the hearing of the second appeal and no reference was therefore made to it in the judgment. The petitioner contends that, notwithstanding his failure to raise that point at the hearing of the second appeal, it is open to this Court now to certify that the case involves that question, which no doubt is a substantial question of law relating to the interpretation of the Government of India Act, 1935.

It seems to me that the contention cannot be accepted. The last clause of sub-section 1 of section 205, *viz.* :

> " And it shall be the duty of every High Court in British India to consider in every case whether or not any such question is involved and of its own motion to give or to withhold a certificate accordingly "

would seem to presuppose that the question was raised before the High Court, as otherwise it is difficult to see how it would be possible for that Court *of its own motion* to give or withhold a certificate such as is referred to in the section. This view receives further support from the terms of sub-section 2 which, as pointed out by their Lordships of the Privy Council in *The Punjab Co-operative Bank, Ltd.* v. *Commissioner of Income-tax, Lahore*[2], allows an appeal to the Federal Court on " defined grounds " where a certificate under sub-section (1) is given. One of such grounds which is material here is that a question of the kind specified in the section has been " wrongly decided," which, I take it, means wrongly decided by the Court from whose judgment, decree or final order the appeal is sought to be preferred. It would no doubt have been an unwarrantable trespass upon the time of the Court to reargue before me the point which, so far as this Court is concerned, has been concluded by the Full Bench decision already referred to. But the point could and should, if a further appeal was contemplated, have been mentioned as being still a live issue between the parties though, of course, it would have been decided in accordance with the pronouncement of the Full Bench. This indeed was done in several cases where a certificate under section 205 has been granted in regard to this very point. The question not having been raised and decided in the proceedings in this Court, no certificate under section 205 can, in my opinion, be granted.

The petition is dismissed with costs.

K.C. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Narella Satyanarayanamurthi .. *Petitioner.**

Criminal Law Amendment Act (XX of 1938), section 7 (1)—Procedure—Sub-Inspector's report disclosing facts constituting only a particular offence—No jurisdiction to try accused for other offences.

Under section 7 (1) of the Criminal Law Amendment Act, before a person can be tried for any offence punishable under that section there must be a report in writing of facts which constitute such offence. Although a number of offences punishable under section 7 may be disclosed in the report, no Magistrate can take cognizance of any one of those offences unless that particular offence is constituted by the facts set out in the report.

Petition under sections 435 and 439 of the Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Court of

1. (1939) 1 M.L.J. 272 : I.L.R. (1939) Mad. 151 (F.B.).
2. I.L.R. (1940) Lah. 685.

*Cr. R. C. No. 75 of 1943.
(Cr. R. P. No. 71 of 1943). 26th February, 1943.

Session of the Guntur division, dated 9th January, 1943, in C. A. No. 129 of 1942, preferred against the judgment of the Court of the Sub-Divisional Magistrate of Ongole in C. C. No. 144 of 1942, dated 21st December, 1942.

V. T. Rangaswami Aiyangar and *K. S. Sankararaman* for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—A report or charge sheet was filed by the Sub-Inspector of Chirala in the Court of the Sub-Divisional Magistrate of Ongole in which several offences punishable under section 7 (1) of the Criminal Law Amendment Act were disclosed. The warrant procedure was adopted, but a charge was framed with regard to an offence not mentioned in the charge sheet. Upon that offence being proved to the satisfaction of the Sub-Divisional Magistrate, the accused was convicted. His appeal was dismissed by the Sessions Judge of Guntur. The question is whether in view of the second clause of section 7 (1) of the Act, the trial Court had jurisdiction to convict the accused.

Section 7 (1) (2) says that,

"No Court shall take cognizance of an offence punishable under this section except upon a report in writing of facts which constitute such offence . . . . ."

It would follow that before a person can be tried for any offence punishable under that sub-section, there must be a report in writing of facts which constitute such offence. This means that unless a report is filed disclosing facts which constitute a particular offence, the Court is not entitled to frame a charge and try an accused for that offence. The argument of the learned Public Prosecutor is that since a number of offences punishable under the section were disclosed by the report, the Magistrate had cognizance under that section and having cognizance, could try the accused in any charge disclosed by the evidence, although it might not have been constituted from the facts set out in the report. I find it difficult to accept that argument. Many offences punishable under section 7 may be committed; but no Magistrate can take cognizance of any one of those offences unless that particular offence is constituted by the facts set out in the Sub-Inspector's report. It seems to me to follow that as this particular offence of compelling shop-keepers to close their shops was not indicated in the charge sheet, the Court was not at liberty to try the accused for that particular offence. The acceptance of the learned Public Prosecutor's argument would mean that a report disclosing an offence of which an accused person may be completely innocent could be used as a basis for his conviction of an offence regarding which there had been no report at all—which would lead to the evasion of the safeguard that the Legislature thought necessary to impose that a person should not be tried for an offence unless there was a report by a police officer of a certain rank setting out the facts which constitute that particular offence.

The petition is allowed and the conviction of the accused set aside. His bail bond will be cancelled.

K.S. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HAPPELL.

V. Rangaswami Aiyangar .. *Petitioner** (*1st Defendant*)

v.

Ammayee Ammal and others .. *Respondents* (*Plaintiff and Defts.*).

Court-Fees Act (VII of 1870, as amended), sections 7 (iv) (c) and 7 (iv-A)—Applicability—Suit to declare mortgage deed to be sham and for injunction—Consequential relief—Valuation of suit for court-fees and jurisdiction—Order returning plaint—Defendant not preferring appeal—Plaint presented to proper Court—Objection as to jurisdiction whether maintainable.

The first respondent filed a suit substantially for a declaration that the usufructuary mortgage deed in favour of the petitioner was a sham and nominal transaction and for an injunction restraining the petitioner from interfering with the payment of rents by the tenants to the first respondent. The

*C. R. P. No. 1498 of 1942. 13th January, 1943.

suit was in the first instance presented in the Court of the Subordinate Judge, but on the ground that the value of the suit for court-fee and jurisdiction was Rs. 3,000 that Court ultimately returned the plaint for presentation in the Court of the District Munsiff. The plaint was thereupon presented in the Court of the District Munsiff and the petitioner then raised a preliminary objection that the suit was under-valued and should have been presented in the Court of the Subordinate Judge. It was held that that the suit was properly valued and presented to the proper Court. The petitioner preferred a revision petition to the High Court against the said order. It was contended for the respondent that the petitioner's proper remedy was to file an appeal against the previous order of the Subordinate Judge, and that it was not open to him to go behind that order once the plaint was presented in the Court of the District Munsiff.

Held, that as the plaint was returned before the suit was numbered in the Subordinate Judge's Court and without notice to the petitioner, the order of return was not binding on him and his omission to prefer an appeal therefrom would not prevent him from raising the question of jurisdictional value before the District Munsiff.

Held, however, that the relief as to injunction restraining the petitioner from interfering with the payment of rent by the tenants to the respondent was clearly consequential on the prayer for a declaration that the usufructuary mortgage in favour of the petitioner was a sham and nominal document, and that the plaint was liable to court-fee on the basis of one half of the estimated market value of the property under section 7 (*iv*) (*c*) of the Court-Fees Act and that section 7 (*iv-A*) of the Act had no application as the respondent was not a party to the mortgage deed.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the District Munsiff of Ranipet, dated 6th August, 1942, and made in O. S. No. 93 of 1942.

K. S. Desikan for Petitioner.

B. V. Viswanatha Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—The question in this revision petition relates to the court-fee payable on a suit brought by the respondent against the petitioner and so to the question of the Court by which the suit should be tried. The respondent held a usufructuary mortgage in respect of certain property and the suit was substantially for a declaration that the usufructuary mortgage deed in favour of the petitioner was a sham and nominal transaction and for an injunction restraining the petitioner from interfering with the payment of rents by the tenants to the respondent. The suit was in the first instance presented in the Court of the Subordinate Judge of Vellore; but it was ultimately returned under an order made by the Subordinate Judge, on the ground that the value of the suit for court-fee and jurisdiction was Rs. 3,000, for presentation in the Court of the District Munsiff. The plaint was then presented in the Court of the District Munsiff of Ranipet; and the petitioner there raised a preliminary objection that the suit was under-valued and should have been presented in the Court of the Subordinate Judge. In view of the order of the Subordinate Judge the District Munsiff was doubtful whether he had jurisdiction to go into the question; but he did go into it and on the merits decided that the suit was properly valued and that he had jurisdiction. The respondent has raised a preliminary objection that the petitioner's proper remedy was to file an appeal against the order of the Subordinate Judge, and that it was not open to the petitioner to go behind his order once the plaint had been represented in the Court of the District Munsiff. No doubt, an appeal is provided under Order 43, rule 1 (*a*), from an order under rule 10 of Order 7, returning a plaint to be presented to the proper Court. In this case, however, the plaint was returned before the suit was numbered in the Subordinate Judge's Court and without notice to the petitioner. It seems to me impossible therefore to say that the order was one adverse to the petitioner against which he could appeal. This point therefore fails, but on the merits I can have no doubt that the decision of the District Munsiff was right.

The arguments advanced against the order are that the suit did not fall properly under section 7 (*iv*) (*c*) of the Court-Fees Act, but under section 7 (*iv-A*) and that in any case the proper valuation was a sum greater than Rs. 3,000. It is argued that the suit properly fell under section 7 (*iv-A*) because it was in substance a suit for the cancellation of the usufructuary mortgage deed executed in favour of the petitioner. This contention is clearly untenable since the respondent was not a party to this mortgage deed. The criticism that the suit should have been valued

at a sum greater than Rs. 3,000 can also not be accepted. The proviso to section 7 (*iv*) (*c*) of the Court-Fees Act is to the effect that the valuation of suits coming under sub-clause (*c*) in cases where the relief sought is with reference to any immovable property shall not be less than half the value of the immovable property calculated in the manner provided for by paragraph v. The value of the suit for the purpose of the court-fee was therefore half the market value and the figure given by the respondent, Rs. 6,000, is the same as the amount which she advanced in respect of her usufructuary mortgage. No doubt, as argued for the petitioner, it might be expected that the value of the property would be greater than the amount for which it has been mortgaged. No rule, however, has been made under section 3 by the Madras Government for determining the value of land for the purpose of jurisdiction, and as both the lower courts accepted the valuation of Rs. 6,000 based on the amount for which the land was mortgaged, there can be no reason for interference in revision on the ground that the valuation is too low.

The last point taken is that the injunction sought is not a consequential relief so that separate court-fee must be paid in respect of it; and that consequently, as the payment of a separate court-fee for the injunction will make the value of the suit more than Rs. 3,000 the jurisdiction of the District Munsiff's Court is ousted. This contention also fails. The relief sought, namely, an injunction restraining the petitioner from interfering with the payment of rent by the tenants to the respondent, is clearly consequential on the prayer for a declaration that the usufructuary mortgage in favour of the petitioner was a sham and nominal document.

The petition is therefore dismissed with costs.

B.V.V. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MOCKETT.

P. Mahammadhu Sahib Rowther .. *Petitioner**

v.

Muthu Samban and others .. *Respondents.*

Civil Procedure Code (V of 1908), section 115—Village Panchayat Court's ex parte *decree—Application to set aside decree after more than 3 years—District Munsiff's decision based not on the record before him but on his own supposition of what the cases should be—Irregularity in exercising jurisdiction attracting interference in revision.*

Where a District Munsiff exercised his jurisdiction most irregularly by deciding not on the record before him, but on what he supposed should have been the record, the order of the Munsiff is clearly one which attracted the jurisdiction of the High Court to interfere in revision against his decision given on a revision petition under section 73 of the Village Courts Act.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the District Munsiff of Tenkasi dated 17th June, 1942, in O. P. No. 18 of 1942 (C. S. No. 242 of 1938, Tenkasi Village Panchayat Court).

A. Swaminatha Aiyar for Petitioner.

S. Ramachandra Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—This is a civil revision petition to revise the order of the District Munsiff of Tenkasi. The District Munsiff refused to set aside an order of the Panchayat Court of Tenkasi restoring to the file Suit No. 242 of 1938, filed in that Village Panchayat Court. It appears that a Suit No. 241 of 1938 was also filed by the petitioner against the same defendants-respondents. Suit No. 241 of 1938 was decreed *ex parte* and it is admitted that an application to set aside that *ex parte* decree was dismissed. It is clear from the record that these suits appeared side by side and day by day together. The decree in Suit No. 242 of 1938 was passed on the 30th January, 1939. Nevertheless on the 23rd March, 1942, that is to say, three years and two months after the *ex parte* decree, a petition was filed before the Panchayat Court seeking to set aside the decree on the ground that the summons had

*C. R. P. No. 769 of 1942. 17th February, 1943.

not been served. This the Court did without giving any reasons. On a revision petition under section 73 of the Village Courts Act being filed before the District Munsiff, he made the following remarkable observations:

"No doubt the records show that respondents appeared on the various dates to which the suit was adjourned. Possibly it is a mistaken entry because it is stated before me by the petitioner that he had filed another suit C. S. No. 241 of 1938 against the very same defendants and that suit was also taken up along with C. S. No. 242 of 1938 on all the adjourned dates. The lower Court has not stated its reasons for setting aside the *ex parte* decree. It is just possible that the lower Court believed that these respondents were not served with suit summons and that the entries in the diary were made under a mistake."

It will therefore be seen that although the record shows that the defendants appeared throughout on the days on which the suit was posted and although the suit summons which I have examined purports to show that it was signed by the defendants-respondents, the Munsiff, for reasons which I cannot pretend to understand, has refused to set aside the order setting aside the *ex parte* decree by bringing into existence a theory, for which there is no foundation whatever from the records, *i.e.*, that the records of the Court had been wrongly filled up. Apart from the presumption that official acts of this sort are rightly done, there is every probability amounting virtually to a certainty that the defendants were in Court on that day throughout, and preferred to take no part in the proceedings. Therefore, although they were in the Court, and although they knew of the suit, the Panchayat Court has set aside an *ex parte* decree more than three years after. Such an order was in my opinion not within the jurisdiction of the Panchayat Court, and in any case was clearly unjust in accordance with the working of section 73.

It is suggested however that the Munsiff has discretion to deal with these matters which should not be interfered with, and the decision of Jackson, J., reported in *Sundara Naicker* v. *Potti Naicker*[1] has been cited. There is nothing whatever in that judgment which affects the jurisdiction of this Court to put right such a manifest miscarriage of justice as has occurred in this case. If I am asked to give a specific reason, I would say that in this case the Munsiff has exercised his jurisdiction most irregularly by deciding not on the record before him, but on what he supposed must have been the record. The order of the Munsiff is clearly one which attracts the jurisdiction of this Court. I shall therefore allow the civil revision petition with costs throughout, and the result will be that the Munsiff's order will be set aside and there will be an order, which the Munsiff should have made, setting aside the order of the Panchayat Court setting aside the *ex parte* decree. The result will be that the decree will be restored.

K.C. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Bagavandas Moopanar .. *Petitioner**

v.

Muhammad Gani Rowther .. *Respondent.*

Criminal Procedure Code (VI of 1898), section 148 (3)—Successor to Magistrate who passed a decision under sections 145 to 147 cannot pass orders as to costs under section 148 (3).

A successor to the Magistrate who passed an order under sections 145 to 147 of the Criminal Procedure Code cannot pass an order as to costs under section 148 (3).

Vythianatha Thambiran v. *Mayandi Chetti*, (1906) I.L.R. 29 Mad. 373; *Kapoor Chand* v. *Suraj Prasad*, (1933) I.L.R. 55 All. 301 (F.B.); *Nafar Chandra Pal* v. *Siddhartha Krishna Mazumdar*, (1920) I.L.R. 47 Cal. 974 and *Manglu Sahu* v. *Ramdhani Tamboli*, A.I.R. 1929 Pat. 93, discussed.

Petition under sections 435 and 439 of the Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Sub-Divisional Magistrate of Kumbakonam, dated 27th October, 1942, and made in M. C. No. 92 of 1942.

1. (1926) 51 M.L.J. 561 : I.L.R. 50 Mad. 494.

*Crl. R. C. No. 3 of 1943. 26th February, 1943.
(Crl. R. P. No. 2 of 1943).

A. S. Sivakaminathan for Petitioner.

S. Sitarama Aiyar for *T. V. Ramanatha Aiyar* for Respondent.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—The question that arises in this petition is whether the successor to the Magistrate who passed a decision under sections 145 to 147 of the Criminal Procedure Code can pass an order as to costs under section 148 (3) of the Code.

A plain reading of section 148 (3) indicates that a successor to the Magistrate who passed an order under sections 145 to 148 cannot pass an order as to costs. As no time limit is laid down in section 148 (3) there is no objection to an order as to costs being passed on a subsequent application; and since that sub-section relates only to a direction as to by whom such costs shall be paid and whether in whole or in part, there can be no objection to a succeeding Magistrate assessing the costs regarding which an order has already been passed. So that decisions which deal with the questions whether a succeeding Magistrate can assess costs or whether an order as to costs can be made some time after a decision under sections 145 to 147 has been passed do not help us.

There is a notable resemblance between the wording in section 148 (3), Criminal Procedure Code, and that in Order 47, rule 2, Civil Procedure Code, with regard to review applications. Against certain classes of orders review applications must be made to the Judge who passed the decree; and it is settled law that "Judge" here refers to the person and not to the office. I think a similar interpretation must be made of the word "Magistrate" in section 148 (3); for if it was intended that any other Magistrate holding the same office might pass an order as to costs, the proper word to be used would be "Court" and not "Magistrate." Moreover, the words "the Magistrate passing a decision" would be unnecessary if it were intended that the succeeding Magistrate might pass such an order; for such powers in a succeeding Magistrate would then be presumed. Section 559, Criminal Procedure Code, empowers a successor in office to any Judge or Magistrate to exercise the powers and perform the duties of that Judge or Magistrate. The Legislature presumably used that language because it is desirable that the Magistrate who decides a case should also decide by whom costs should be paid and in what part or proportion.

In support of the converse interpretation of the words in section 148 (3) the best that Mr. Sitarama Iyer can quote is a passing remark of Subramania Ayyar, J., in *Vythianatha Thambiran* v. *Mayandi Chetti*[1],

> "The word 'passing' which follows the term 'Magistrate' in the said provision, as I understand it, means no more than that the Magistrate who may award costs, is the officer holding the proceeding under the Chapter or his successor entitled to discharge his function in connection with the matter."

The learned Judge however immediately qualifies this remark by saying,

> "Even if this would be going too far, and the right construction were that the award of costs should be made by the same Magistrate that deals with the main question in the proceeding, the order here cannot be held to be void or illegal . . . . . ."

A Full Bench of the Allahabad High Court in *Kapoor Chand* v. *Suraj Prasad*[2], assumed as a matter beyond question that section 148 (3) meant what it said. The question came up for direct decision in *Nafar Chandra Pal* v. *Siddhartha Krishna Mazumdar*[3] and in *Manglu Sahu* v. *Ramdhani Tamboli*[4], in both of which cases the learned Judges concluded that the words "the Magistrate passing a decision" did not include a succeeding Magistrate.

I am therefore of opinion that the Magistrate acted without jurisdiction in ordering costs; for he was not the Magistrate who passed the decision under section 145. The petition is therefore allowed and the order as to costs set aside.

K.S. — *Petition allowed.*

---

1. (1906) I.L.R. 29 Mad. 373.
2. (1933) I.L.R. 55 All. 301 (F.B).
3. (1920) I.L.R. 47 Cal. 974.
4. A.I.R. 1929 Pat. 93.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Thommandra Venkata Siddayya .. *Appellant** (*1st Plaintiff*)

v.

Ediga Sanjappa and others .. *Respondents* (*Defts. and Plffs. 2 & 3*).

Madras Agriculturists' Relief Act (*IV of 1938*), *section 8* (*2*) *and* (*3*)—*Consolidation in 1926 of pre-existing debts and a fresh advance—Payments towards component debts before consolidation—Damdupat rule—Mode of applying.*

On 16th February, 1926, the principal outstanding on three earlier advances, together with a further cash advance were consolidated into a single mortgage for Rs. 1,000. It was found that interest on the earlier advances had been regularly paid and the principal only of each of the antecedent transactions was consolidated in the fresh mortgage. As to the correct method of scaling down the debt,

Held, (1) the debt must be scaled down as it stood at the time of the commencement of Act IV of 1938 and not as it stood on the date of the consolidation.

(2) For the purpose of scaling down the debt all the advances must be clubbed and all the payments towards any of the component debts by way of principal or interest must be clubbed and the whole treated as a single transaction and the creditor will be entitled to a decree for the difference between twice the notional principal and the amount of the payments by the debtor.

What would be the position if the composite debt were made up of two antecedent transactions one of which is protected from the procedure under the Act left open.

Appeal against the decree of the District Court of Kurnool in A. S. No. 78 of 1940, preferred against the decree of the Court of the District Munsiff of Kurnool in O. S. No. 66 of 1939.

P. C. Parthasarathi Aiyangar for Appellant.

Respondent not represented.

The Judgment of the Court was delivered by

Wadsworth, J.—This appeal involves a question of the applicability of what is commonly known as the *damdupat* rule in sub-sections (2) and (3) of section 8 of Madras Act IV of 1938 to a debt which is the result of the clubbing together of pre-existing debts due to the same creditor by the same debtor when payments have been made towards the separate debts before the clubbing took place. We are not aware of any decision of this Court which has laid down the correct method of dealing with such cases under these provisions.

The facts established are that on 15th April, 1914, the appellant who is the creditor advanced Rs. 300 on a mortgage bearing interest at 18 per cent. under Ex. B. On 22nd May, 1916, he made a further advance of Rs. 200 on a mortgage Ex. C bearing interest at 24 per cent. On 1st November, 1925, he advanced a sum of Rs. 50 on a promissory note which has not been exhibited. The rate of interest according to the defendants' evidence was either 12 or 15 per cent. On 16th February, 1926, these three advances were consolidated into a single mortgage Ex. A, a further advance of Rs. 450 being made in cash at the time of the consolidation. Having regard to the state of accounts between the parties on the three transactions, the total consideration for the consolidated mortgage was Rs. 1,000, that is to say, the sum of Rs. 450 together with the principal only of each of the three antecedent transactions. Plaintiff's case was that at the time of this consolidated mortgage he gave up all the interest on the earlier transactions none of which had been paid. As the plaintiff did not produce his accounts, this not very probable story has been quite rightly rejected. Both the Courts below have accepted the defence version that the reason why only the principal amount of these antecedent debts came to be included in the consolidated mortgage was that all the interest on these earlier debts had been regularly paid. The Courts below have however rejected the defence assertion that payments were all made towards the consolidated mortgage.

On these facts the learned District Judge has applied the *damdupat* rule in a manner which seems hardly to be warranted by the terms of section 8. He has taken the three antecedent documents, added together the principal, multiplied it by two, added together all the payments made towards these three antecedent

*S. A. No. 1182 of 1941. 21st January, 1943.

documents, and finding that more than twice the principal of these three documents had been paid at the time of the consolidation, has treated these documents as if they were discharged and as leaving a mortgage for the fresh cash advance of Rs. 450 towards which no payment had been made, and for this amount a decree has been given with interest at the statutory rate. What in effect the learned District Judge has done has been not to scale down the debt as it stood at the time of the commencement of the Act having regard to the principal sum originally advanced and any further advances made thereafter, but to scale down the consolidated debt as it stood on 16th February, 1926, and treat the fresh advance as one in respect of which the interest was cancelled under the first clause of section 8. That is not in our opinion the procedure which the section contemplates.

Incidentally we observe that in calculating the amount paid towards these three debts, both the Courts below appear to have relied not upon the evidence adduced by the defendant but upon the figure given in his written statement. In the written statement the defendant asserts that a total amount of Rs. 1,744 was paid by way of interest up to the date of the consolidation of the debts. In the actual evidence, the defendant's evidence is that he paid regularly the interest due as required in the documents without falling into arrears at all. Calculating the actual interest due on the first two documents we find that it amounted to Rs. 102 per annum. The interest on the promissory note cannot have amounted to much more than Rs. 2 at the time when the consolidated note was executed, for it had been running only for just over three months. It seems to us apparent that on the defence evidence that the debtors paid the full amount of interest due on all these three documents and nothing towards the principal, the total of his payments as on 16th February, 1926, would be approximately Rs. 1,130, not Rs. 1,744 as alleged in his written statement.

Assuming that Rs. 1,130 was paid on these three antecedent transactions, being made up of the amount of Rs. 648 due on the first document, Rs. 480 due on the second document and Rs. 2 due on the third document, and that nothing was paid towards the consolidated mortgage, what is the result of the application of section 8 in the manner most favourable to the defendant? It has been suggested that when separate debts towards which payments have been made have been consolidated into a single debt, payments made towards the separate debts cannot be clubbed together and treated as payments towards the consolidated debt for the purpose of applying clauses 2 and 3 of section 8. No doubt it may at first sight seem anomalous when there are two debts towards one of which there has been a long series of regular payments and towards the other no payments at all and these two debts come to be clubbed together into a single debt, to treat all the payments made to one of the earlier transactions as payments towards the composite transaction. On the other hand that seems to be the method contemplated in the Act. The explanation to section 8 says that where a debt has been renewed, the principal advanced together with such sums as have been subsequently advanced as principal shall alone be treated as the principal sum repayable. This explanation applies to the whole of section 8, not merely to the first clause thereof. Applying this explanation to clauses 2 and 3, it seems to follow that where the word "principal" is used in these clauses, the Legislature intended to refer not to the actual principal of the debt subsisting when the Act came into force, but to what we have described as the notional principal calculated in the manner laid down in the explanation, and when these clauses speak of payments whether by way of principal or interest towards the debt, it seems to follow that we must take into account payments made towards any component part of that principal having regard to the way in which it is to be calculated by totalling all the sums advanced at different stages. In fact, the Legislature seems to have treated debts which have a long antecedent history and become consolidated by the addition of varying advances made at different times, as if the whole liability were a single advance, the principal of which is the sum total of the various sums actually advanced; that is to say, the Legislature seems to have ignored the anomaly resulting from payments made towards one portion of the principal being regarded as payments made towards the principal as a whole,

We wish to safeguard ourselves against making any pronouncement upon what would be the position if the composite debt were made up of two antecedent transactions, one of which is protected from the procedure under the Act.

It seems to us that the only logical alternative to the method suggested above, of clubbing all the advances and clubbing all the payments and treating them as a single transaction, would be to hold that the *damdupat* clauses cannot be applied at all where separate debts have been consolidated into a single debt, except perhaps with effect from the date of consolidation. This seems to amount to a partial rejection of the scheme of the explanation to the section, and it has the notable disadvantage that it gives the maximum benefit to the comparatively undeserving debtor who has paid nothing towards his debts by the application of clause 1 of section 8 and refuses anything but a modicum of relief to the deserving debtor who has been paying regularly for a long period of years for whose relief clauses 2 and 3 have been inserted. We do not think that it was the intention of the Legislature to refuse the relief contemplated under clauses 2 and 3 of section 8 merely because the separate debts have come to be consolidated by agreement of parties.

A further suggestion has been made that it would be more logical to carry out the scaling down operations under these clauses in two stages, firstly by applying these clauses to the separate debts up to the date of consolidation and arriving at a new figure of the amount which would be substituted for the actual figure found in the consolidated document and then the process contemplated in these clauses would be applied once again with reference to payments made after consolidation. Such a method would, no doubt, be fairly logical. Unfortunately there is nothing in the Act to warrant its adoption. We do not feel disposed to read into the Act provisions which are not there, however desirable those provisions may be.

In the result, therefore, we allow the appeal to this extent that the total notional principal of the debt as scaled down will be Rs. 1,000, the total payments made towards this debt will be Rs. 1,130, and the appellant will be entitled to a decree for the difference between twice the notional principal and the amount of the payments, that is to say, he will have a decree for Rs. 870 with interest at $6\frac{1}{4}$ per cent. from 1st October, 1937. Proportionate costs in all the three Courts.

K.S. ——— *Appeal allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KING.

Vaithilinga Naidu .. *Appellant**

v.

Narayanaswami Naidu .. *Respondent.*

Limitation Act (IX of 1908), section 14 (2)—Execution applications—Interval more than 3 years between—Insolvency proceedings started meanwhile—Delay due to defect of jurisdiction of Court—Computation of period of limitation—Applicability of section 14.

A decree-holder put in an execution petition, and before it was in fact dismissed, in July, 1933, he applied in the District Court for the adjudication of the judgment-debtor as an insolvent. The District Court transferred the application to the Sub-Court which adjudicated the judgment-debtor as an insolvent; and the insolvency petition remained pending until 1938, when the District Court recalled the petition to its own file on the ground of the lack of jurisdiction of the Sub-Court to deal with the matter. The District Court refused to adjudicate the judgment-debtor as insolvent on the ground of want of proof of acts of insolvency. The decree-holder again put in an execution petition for the arrest of the judgment-debtor in 1939. On the question whether the second execution application put in after 3 years of the previous one, was within time, and whether section 14 of the Limitation Act would apply to this case,

Held, (1) since the Sub-Court had no jurisdiction to entertain the insolvency application, the time during which the proceedings were pending in that Court should be excluded in computing the period of limitation and section 14 of the Limitation Act applied to the case.

(2) Where the control of the proceedings had passed from the decree-holder's hands to the hands of the Official Receiver in Insolvency, any subsequent delay in the administration of insolvency could not be imputed to the person who originally filed the petition.

(3) Since the ultimate purpose in both execution applications of 1933 and 1939 was the same in substance, namely, that the amount due to the decree-holder may be realised and paid, the relief

*A. A. A. O. No. 34 of 1942. 21st January, 1943.

asked in each should be deemed to be the same, and the Court would be right in applying section 14 to the facts of the case.

Appeal against the order of the Court of the Subordinate Judge of Cuddalore dated 22nd September, 1941, and passed in A. S. No. 31 of 1941, preferred against the order of the Court of the District Munsiff of Tirukoilur, dated 10th February, 1940 and passed in E. P. No. 420 of 1939 in O. S. No. 117 of 1932.

C. Padmanabha Aiyangar for Appellant.

K. Srinivasan and *N. T. Raghunathan* for Respondent.

The Court delivered the following

JUDGMENT.—The question which arises in this appeal is one of limitation. There was an execution petition filed by a decree-holder in March, 1939. This was his second execution application, the first one having been dismissed in July, 1933. The interval between these two dates is obviously more than three years, but he contended that a large part of the interval was covered by the language of section 14 of the Limitation Act and it has been held by the lower appellate Court that this contention is valid. The appeal is by the judgment-debtor who holds that section 14 cannot properly be applied. The other relevant dates and facts in the case are these: In June, 1933, before the first execution petition had in fact been dismissed, the decree-holder applied to adjudicate the appellant as an insolvent. His application was made in the Court of the District Judge of South Arcot who in December, 1933, transferred it to the Subordinate Judge of Cuddalore. There the judgment-debtor was adjudicated insolvent on 5th February, 1934, and the insolvency petition remained pending until in 1938, the District Judge following a decision of this Court recalled the petition from the file of the Subordinate Judge on the ground that the learned Subordinate Judge had no jurisdiction to deal with it. The District Judge having thus resumed the case on his own file, finally disposed of it by refusing to adjudicate the appellant an insolvent on the ground that no acts of insolvency had been proved against him. The petition to adjudicate him was accordingly dismissed in November, 1938.

The question which now arises is essentially this: whether the period from December, 1933 to July, 1938, during which the insolvency petition was pending on the file of the Subordinate Judge can be allowed for under section 14 of the Limitation Act. If it can, it is quite clear that the present execution application is well within time. Section 14 (2) runs as follows:

> "In computing the period of limitation prescribed for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or in a Court of appeal, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it."

There can be no doubt that the Subordinate Judge had no jurisdiction to entertain the insolvency petition. There can also be no doubt that the petitioner was acting in good faith in continuing his proceedings before the learned Subordinate Judge. It was of course impossible for him to have questioned the action of the learned District Judge in transferring his insolvency petition to the Subordinate Judge. It is argued that although the respondent may have shown good faith he did not show due diligence and in support of this argument the fact that the insolvency petition remained pending for so many years has been mentioned. It seems to me that this does not in any way affect the question of the diligence of the decree-holder. The decree-holder filed his application to have the judgment-debtor adjudicated and once the adjudication order was passed—and that was passed with reasonable promptitude—the control of the proceedings naturally passed from the decree-holder's hands into the hands of the Official Receiver and if there has been any subsequent delay in the administration of the insolvency, I do not see how the person who originally filed the insolvency petition can in any sense be blamed for that delay. It seems to me therefore that in this matter also section 14 applies.

It has been argued on behalf of the appellant that section 14 will not apply because there is no formal order of the Subordinate Judge dismissing the insolvency application on the ground that he had no jurisdiction. This seems to me to be totally

irrelevant. Section 14 does not require any order of the Court which had no jurisdiction recognising that fact. All it requires is that the Court which has to decide the question of limitation must find that the other Court was unable to entertain a proceeding because it had no jurisdiction. Also it is obvious that the fact that the Subordinate Judge retransmitted the file on the orders of the District Judge to the District Judge is the equivalent of an order of the Subordinate Judge acknowledging that he had no jurisdiction. This objection therefore to the applicability of section 14 seems to me to have no force.

The only objection which requires serious consideration in my opinion is the objection that in applying to the Insolvency Court in 1933, and in filing this execution application in 1939, the respondent was not asking for the same relief. In a narrow sense, this may perhaps be true. In 1933, all that the respondent asked for was that the appellant should be adjudicated an insolvent. In 1939, the precise kind of execution for which the respondent applied was the arrest of the appellant. It is of course obvious that the adjudication of a man as an insolvent and the arrest of that man in execution of a decree are two different reliefs. In essence, however, it seems to me that the respondent was asking for the same relief. His proceedings in insolvency were not confined to the adjudication of the appellant as an insolvent. They continued after that date and were obviously prosecuted by him in the hope and with the purpose that at some time a dividend would be paid to him from the insolvent's estate. It was therefore an application whose ultimate purpose was to receive money and, at any rate, after the adjudication all further steps which were taken by the respondent, were directly to obtain money from the Official Receiver. In the execution application in 1939 no doubt the arrest of the judgment-debtor is asked for, but the actual language of the execution petition is this : after tabulating the amount due to the decree-holder, the decree-holder prays that " the Court may be pleased to pass an order directing that the amount may be realised and delivered to him . . . . ." by various methods falling under Order 21. He therefore definitely and clearly asks for money to be paid to him. It seems to me, in these circumstances, that both in the Insolvency Court and in the executing Court the respondent was definitely asking for the realisation of money from the appellant to be paid to him ; or in other words that the relief is the same relief.

On these grounds I hold that the lower appellate Court was right in applying section 14 to the facts of this case, and that when that section is applied, the execution petition of the respondent is within time. This appeal accordingly fails and is dismissed with costs.

Leave refused.

K.C. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Kunhiyoor Manakkal Tavazhi Karnavan and Manager Neelakandhan Nambudripad .. *Appellant** (*1st Respondent*)

v.

Advocate Mr. C. G. Krishna Aiyar and another. *Respondents* (*3rd Petr. and Respt.*).

Malabar Tenancy Act (*XIV of 1930*), *sections 22, 24 and 25—Renewal of kanom—Material date—More than one renewal fee whether can be collected—Suit for redemption—Decree passed on condition of payment—Application for renewal of kanom—Decision in one—Effect in other proceeding—Question not specifically raised or decided—Bar of* res judicata.

A landlord brought a suit to evict his tenant because in the words of section 20 (3) of the Malabar Tenancy Act, the period of the kanom had expired and no renewal had been obtained. The tenant thereupon exercised the right given to him under section 23 (*b*) to file an application under section 22 to have a renewal of the kanom. The period of the kanom had expired on the 25th April, 1926 ; but neither had the landlord taken action to evict the tenant nor had the tenant applied for renewal until the suit was filed in 1938. The District Munsiff before whom the suit and the renewal application were filed held that as a further period of twelve years had expired since the expiry of the original kanom in 1926, two renewal fees were necessary. He therefore dismissed the application of the tenant on the ground that the sum to be deposited by him, namely the value of the two renewals

---

*A. A. O. No. 642 of 1941. 16th October, 1942.

had not been deposited. The tenant went in appeal to the Subordinate Judge who held that it was immaterial when the period of the kanom expired, and that the termination of the kanom was the date on which the Act came into force. He therefore allowed the appeal and remanded the application for fresh disposal, giving a finding that the twelve years of renewal were to date from the coming into force of the Act in 1930. The landlord appealed to the High Court against the remand order while the tenant preferred a memorandum of cross-objections, contending that the kanom must be deemed to have been terminated on the date on which the application to renew was made. It was contended that the latter contention must be deemed to have been decided finally by the decree in the redemption suit filed by the landlord because the tenant had not appealed against it.

Held, that the decision in the redemption suit did not operate as *res judicata* so as to prevent the Court from going into the question of renewal fee in the appeal.

Panchanada Velan v. *Vaithinatha Sastrigal*, (1905) 16 M.L.J. 63 : I.L.R. 29 Mad. 333 (F.B.), *Abdul Majid* v. *Jew Narain Mahto*, (1888) I.L.R. 16 Cal. 233 and *Sevadappa Goundar* v. *Narayanaswami Aiyar*, (1940) 1 M.L.J. 647, considered.

Held also, that the Malabar Tenancy Act did not contemplate the collection of more than one renewal fee or contain any indication that the Court was at liberty to take into account the duration from the expiry of the kanom to the date of the suit in order to ascertain whether more than one period of twelve years had elapsed. And section 24 (*b*) of the Act obviously contemplates the falling due of instalments and therefore of the termination of an expiring transaction before the coming into force of the Act. Meaning of the word " renewal " in the Act discussed.

Appeal against the order of the Court of the Subordinate Judge of Ottapalam, dated 31st July, 1941, and made in A. S. No. 175 of 1940, preferred against the order of the Court of the District Munsiff of Ottapalam, dated 12th August, 1940 and made in O. P. No. 513 of 1938.

K. Kuttikrishna Menon for Appellant.

P. Govinda Menon for Respondents.

The Court delivered the following

JUDGMENT.—The landlord (the appellant) brought a suit to evict his tenant (the respondent) because, in the words of section 20 (3) of the Malabar Tenancy Act, the period of the kanom had expired and no renewal had been obtained. The tenant thereupon exercised the right given to him under section 23 (*b*) to file an application under section 22 to have a renewal of the kanom. The period of the kanom had expired on the 25th April, 1926 ; but neither had the landlord taken action to evict the tenant nor had the tenant applied for renewal until the suit was filed in 1938. The District Munsiff before whom the suit and the renewal application were filed held that as a further period or 12 years had expired since the expiry of the original kanom in 1926, two renewal fees were necessary. He therefore dismissed the application of the tenant on the ground that the sum to be deposited by him, *viz*., the value of two renewals, had not been deposited. The tenant went in appeal to the Subordinate Judge, who held that it was immaterial when the period of the kanom expired, and that the termination of the kanom was the date on which the Act came into force. He therefore allowed the appeal and remanded the application for fresh disposal, giving a finding that the twelve years of renewal were to date from the coming into force of the Act in 1930. The landlord has appealed to this Court against that remand order, while the tenant has preferred a memorandum of cross-objections, contending that the kanom must be deemed to have been terminated on the date on which the application to renew was made.

Mr. Kuttikrishna Menon has raised a preliminary point that this matter must be deemed to have been decided finally by the decree in the redemption suit filed by the landlord because the tenant had not appealed against it. In the redemption suit this question of the renewal fee and the date from which it began to operate was not raised in the form of an issue as one would have expected ; but in the decree it was ordered that the tenant should pay such and such a sum on a certain date and if he did not do so his suit would stand dismissed with costs. As the tenant did not pay the sum by that date, the decree was tantamount to a dismissal of the suit on the day after the date on which the tenant was ordered to pay that sum. This point, I consider, is directly covered by the Full Bench case in *Panchanada Velan* v. *Vaithinatha Sastrigal*[1], in which there were two suits—one by the landlord and the other by the tenant—in which precisely similar questions were raised.

1. (1905) 16 M.L.J. 63 : I.L.R. 29 Mad. 333 (F.B.).

There was a common judgment; and it was held that "the very object of the appeal, in substance if not in form, is to get rid of the adjudication which is said to render the question which the appellate Court was asked to decide *res judicata.* The tenant's appeal in his suit if successful would have the effect of superseding the adjudication in the landlord's suit."

The learned Judges approved of the decision in *Abdul Majid* v. *Jew Narain Mahto*[1], in which there were two judgments. Mr. Kuttikrishna Menon, citing the decision of King, J., in *Sevadappa Goundar* v. *Narayanaswami Aiyar*[2], contends that the principle laid down in *Panchanada Velan* v. *Vaithinatha Sastrigal*[3], ought not to be extended and should be confined only to those cases where the suits raised precisely the same points and where there is a common judgment. The learned Judges in *Panchanada Velan* v. *Vaithinatha Sastrigal*[3], however held that *Abdul Majid* v. *Jew Narain Mahto*[1], had been rightly decided, and that that was not a case precisely similar to *Panchanada Velan* v. *Vaithinatha Sastrigal*[3], for not only were there two judgments but the suits were not precisely similar, only the most important issue in the two suits being the same. The principle enunciated in *Panchanada Velan* v. *Vaithinatha Sastrigal*[3] was carried a little further in *Ramaswami Chetty* v. *Karuppa Chetty*[4], where there were two judgments, one of which depended, as in this case, on the decision in the other case. It is difficult to distinguish that case in principle from the present one. There was no material contest in the redemption suit other than the point that was raised in the application to renew; and that is why the decree in the redemption suit was made to depend upon the compliance of the tenant with the terms of the order passed on his application. I therefore hold that the decree in the redemption suit did not operate as *res judicata* and so prevent the lower appellate Court from expressing an opinion on the merits of the appeal before it.

I have been taken through section 3 of the Malabar Tenancy Act in which the various terms which are relevant for this appeal have been defined, and through the sections dealing with renewals; but I find no suggestion anywhere that more than one renewal fee can be collected or any indication that the Court is at liberty to take into account the duration from the expiry of the kanom to the date of the suit in order to ascertain whether more than one period of twelve years has elapsed. So I agree with the lower appellate Court that the District Munsiff was wrong. The more important question is the ascertainment of the date from which the renewal must operate. It is conceded that the kanom is for a definite term, and that the kanom expires at the end of that period. But in the renewed deed that is executed by the Court under sub-section 2 of section 25 it is said in sub-section 3 of that section that:

> "a renewal deed executed by the Court under sub-section (2) shall have the same effect as if it was executed by the landlord himself, and shall entitle the tenant to enjoy the holding for twelve years *from the date of the termination of the previous lease, kanom or kuzhikanom.*"

The learned Subordinate Judge thought that the termination of the kanom was something different from the expiry of the term of the kanom and he considered that the kanom was terminated by the coming into force of the Act. Why he selected that particular date it is difficult to know; because there is certainly nothing in any part of the Act which suggests that the coming into force of the Act automatically brings to an end any kanoms or leases in existence. Although a lease or a kanom can be terminated in many ways and not only upon the expiry of the term, the expiry of the term does bring the contract to an end, although the tenant may continue to hold over on the same terms after the expiry of the period. Mr. Govinda Menon for the tenant points out that the reading of section 15 *et sequitar* indicates that the Act is intended to operate in the future and not in the past. That of course is true; and I agree that the Act has no retrospective effect. The Act enables the tenant to avoid eviction by compelling the landlord to renew his lease, kanom, kuzhikanom, etc.; but the renewal is dependent upon the fulfilment by the tenant of certain

1. (1888) I.L.R. 16 Cal. 233.
2. (1940) 1 M.L.J. 647.
3. (1905) 16 M.L.J. 63 : I.L.R. 29 Mad. 333 (F.B.).
4. (1915) 29 M.L.J. 551.

conditions. When the landlord files a suit after the coming into force of the Act for the eviction of the tenant, the latter can avoid that eviction by renewing the lease. 'Renewal' ordinarily means a re-grant on similar terms from the date of the expiry of the earlier contract. If there is an interval between the earlier contract and the later, the second contract can hardly be said to be a renewal of the first contract unless the second contract dates back to the expiry of the first contract. I can find nothing in the Act which suggests that the legislature meant otherwise. On the contrary, there are one or two expressions which indicate that the ordinary meaning of renewal was intended. For example, in section 24 (2) (*b*), in calculating interest which the tenant has to pay upon renewal, it is said that the Court should "make an order for the deposit within a time to be fixed in the said order, of.... (*b*) interest ... on each such instalment from the date on *which it became due or from the date of the commencement of this Act, whichever is later*," the instalments becoming due in the case of a kanom, one-third in the year next after the termination of the expiring transaction and one-third in the next following year. So that section 24 (2) (*b*) obviously contemplates the falling due of instalments and therefore of the termination of an expiring transaction before the coming into force of the Act.

If one does not accept the ordinary meaning of "renewal," one is faced with the difficulty of deciding when the renewal commenced. The learned Subordinate Judge suggested that it was terminated automatically by the passing of the Act. That, as I have remarked, finds no justification in the Act itself. The respondent suggested in the Memorandum of Cross-objections that it expired when he filed his application for renewal. But why should the filing of a renewal application terminate the transaction? The learned Subordinate Judge thought that "termination" meant something different from the expiring of a period, but what was it that was terminated at the time when the tenant made his application for renewal? In his arguments, Mr. Govinda Menon has suggested a third date, the date of the filing of the redemption suit, when there was a unilateral act of the landlord terminating the kanom. If, however, the kanom was not terminated upon the expiry of the term and the legal relationship of jenmi and kanomdar continued, it could not be brought to an end by a unilateral act.

It follows from the above that the learned Subordinate Judge's order has to be modified. The tenant has only to pay at the present time one renewal fee; but the date of renewal will be the 26th April, 1926. The remand order will therefore be modified in the light of the above findings and the District Munsiff will give the tenant some further time if he finds that anything is due in addition to what has been already deposited. Each party will bear his own costs throughout up to this day.

B.V.V. ——— *Decree modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Orupulasseri Manakkal Karnavan and Manager Bhavadasan Nambudripad .. *Appellant** (*Plff.-Respt.*)

v.

Kottilingal Madhathil Kunhukutty Amma's son Tarwad Karnavan and Manager Narayana Nair and others .. *Respondents* (*Defts.-Petr.*).

Malabar Tenancy Act (*XIV of 1930*), *section 25* (*3*)—*Words "from the date of the termination of the previous kanom"—Meaning—Renewal of kanom ordered by Court—Term—Suit by Jenmi for redemption and application for renewal before twelve years—Maintainability.*

The words "from the date of the termination of the previous kanom" in section 25 (3) of the Malabar Tenancy Act, 1930, indicate the date on which a renewal of the kanom is granted and not the date of the termination of the kanom after expiry of the period fixed for redemption.

In 1914, the plaintiff's predecessor granted a kanom to the predecessor of defendants 1 to 3. The term for the redemption of the kanom expired in 1926, but nothing was done and the tenants continued in possession on the basis of the kanom without the question of renewal being raised. In 1936 after the Malabar Tenancy Act came into force the Jenmi filed a suit for redemption and there was a corresponding application by the tenant for renewal. The Court ordered a renewal on 18th August, 1937, and a fresh deed was drawn in terms of the Court's order. The Jenmi however filed a

*S. A. No. 1486 of 1941 and A. A. A. O. No. 370 of 1941. 19th January, 1943.

fresh suit for redemption in 1939 and thereupon the tenants filed a fresh application for renewal contending that the jenmi's suit was premature.

Held, that the renewal ordered by the Court in 1937 would take effect for twelve years thereafter and that the present suit and the application for renewal were both premature.

Decision of Horwill, J., in *Neelakandan Nambudripad* v. *Krishna Aiyar*, (1943) 1 M.L.J. 325, considered.

Appeal against the decree of the Court of the Subordinate Judge of Ottappalam in A. S. No. 136 of 1940, preferred against the decree of the Court of the District Munsiff of Ottappalam in O.S. No. 420 of 1939, and appeal against the order of the Court of the Subordinate Judge of Ottappalam, dated 31st July, 1941 and made in A. S. No. 137 of 1940 preferred against the order of the Court of the District Munsiff of Ottappalam, dated 18th July, 1940 and made in I. A. No. 171 of 1940 in O. S. No. 420 of 1939.

P. Govinda Menon and *D. H. Nambudripad* for Appellant.

K. P. Ramakrishna Aiyar for Respondents.

The Judgment of the Court was delivered by

Wadsworth, J.—The first of these cases arises out of a suit by the appellant, who is the jenmi, for redemption of a kanom and eviction of the tenant. The second case arises out of an application by the tenant for renewal under the provisions of the Malabar Tenancy Act XIV of 1930. The cases have been placed before a Bench because they involve a question of some difficulty, relating to the interpretation of clause 3 of section 25 of that Act. There is no doubt about the facts. On the 14th July, 1914, the plaintiff's predecessor granted a kanom demise to the predecessor of defendants 1 to 3. The term for the redemption of this kanom expired on 14th July, 1926, but nothing was done and the tenants continued in possession on the basis of the kanom without the question of renewal being raised. In 1936, after the Malabar Tenancy Act came into force the jenmi filed a suit for redemption and there was a corresponding application by the tenant for renewal. The Court ordered a renewal, the term of the order being recited in the deed as follows :

> " Whereas under the orders of this Court passed on the said petition on 30th March, 1937, you have duly deposited into Court the sum of Rs. 74-2-9 made up of the arrears of michavaram and interest inclusive of the renewal fee of Rs. 26-6-5, the properties in the subjoined schedule have been hereby granted to you on renewed kanom demise in accordance with the provisions of the Malabar Tenancy Act for the prior kanom amount of Rs. 22-13-9 for the term prescribed under section 25 of the Tenancy Act."

The tenants appear to have thought that they had got a renewal which would last for a considerable period, whatever the date with effect from which it operated. But the jenmi in 1939 filed a fresh suit for redemption and as a matter of caution the tenants filed a fresh application for renewal while contending that the jenmi's suit was premature. The trial Court took the view that the previous renewal granted in 1937 would take effect from the expiry of the period stipulated in the original kanom, that is to say, 14th July, 1926. In appeal the Subordinate Judge took the view that the renewal ordered by the Court in 1937 would take effect from the passing of the Malabar Tenancy Act.

The jenmi has appealed and for the appellant Mr. Govinda Menon has relied very strongly on the decision of Horwill, J., in *Neelakandan Nambudripad* v. *Krishna Aiyar*[1]. The learned Judge, while noticing that the Tenancy Act contemplates only one renewal fee, felt constrained to hold that the phrase "date of the termination of the previous lease, kanom or kuzhikanom," in section 25 (3) must be read as if it were "the date of the expiry of the period of the previous lease, kanom or kuzhikanom." That is to say, it is argued for the appellant that the view taken by the trial Court was right and that the jenmi's suit was not premature. The draftsmanship of the Malabar Tenancy Act has frequently come up for criticism and it cannot be denied that it contains obscurities. The definition of a kanom in section 3 (1) speaks of the liability of the transferee to pay a renewal fee to the transferor, if the transferee is permitted to enjoy the said property for a further period after the termination of

1. (1943) 1 M.L.J. 325.

the original period; that is to say, the word "period" is used to indicate the term of twelve years which is customarily fixed in a kanom document. Section 17 however speaks of the right of the kanomdar to a renewal on "the expiry of the kanom under which he holds," that is to say, it seems to treat the expiry of the kanom as the same thing as the expiry of the period fixed in the kanom. When we come to section 19 we have the phrase "the year next after the termination of the expiring transaction," while section 20 reverts to more explicit language and speaks of the period of the verumpattamdar, kuzhikanomdar or kanomdar as having expired and no renewal having been obtained.

Then in section 24 (2) (*b*) there is a provision for the payment of interest on instalments of renewal fee ordered under the provisions of the Act, which is payable on each instalment "from the date on which it became due or from the date of the commencement of this Act, whichever is later." These words were emphasised before Horwill, J., and have been emphasised before us, as indicating that the Act contemplates a renewal fee becoming due on some date prior to the passing of the Act, which it is argued suggests that the Legislature contemplated an order for retrospective renewal to take effect from some date anterior to the Act. Then we get to the provisions of section 25 (3) with which we are mainly concerned, which provides that a renewal deed executed by the Court under sub-section (2) shall have the same effect as if it was executed by the landlord himself, and shall entitle the tenant to enjoy the holding for twelve years "from the date of the termination of the previous lease, kanom or kuzhikanom." The argument for the appellant is that the Act speaks of "the termination of a kanom" or "the termination of a transaction" or "the expiry of the period of the kanom," meaning in each case precisely the same thing, namely, the end of the twelve years period ordinarily fixed for the redemption of a kanom and that this is the meaning of the phrase "date of the termination of the previous lease, kanom or kuzhikanom," in this sub-section. The argument is fortified by reference to section 24 (2) (*b*) as showing that the Act necessarily has reference to a renewal which takes effect at some point antecedent to the passing of the Act and the argument is that when there is a kanom the period of which expired more than twelve years before the passing of the Act, although under the judgment of Horwill, J., the Court would order only one renewal fee to be paid, the renewal would have to take effect from the date of the expiry of the period in the previous kanom and it would be incumbent on the tenant to make a succession of renewal applications, until these retrospective renewals extend up to the date with reference to which an effective renewal is sought. That is to say, we are asked to assume an intention on the part of the Legislature to give to the jenmi a right to claim retrospective renewal fees once in every twelve years from the end of the period fixed in the last kanom document executed by the parties.

It seems to us that this is a very drastic result to be achieved by mere inferences from not very precise language. We are constrained to think that had the Legislature formulated the intention of giving the jenmi a right to claim a series of renewal fees covering a period during which he took no action to assert his rights, such an intention would have been expressed in explicit language. We are therefore disposed not to accept this interpretation of the provisions from section 25 (3), unless no other interpretation consistent with the language of the Act and not open to similar objections can be discovered. We can see no logical or legal basis for the view taken by the learned Subordinate Judge that the date of the termination of the previous kanom must be the date of the commencement of the Tenancy Act. It has been argued by Mr. Ramakrishna Aiyar for the respondent that the obvious date of the termination of the previous kanom is the date of the renewal itself. The argument may be summarised thus: Under the customs prevailing in Malabar when a jenmi gives a kanom to his tenant a period of twelve years is fixed for its redemption. But if, as very frequently happens, neither party wishes to raise the question of the amount of the renewal fee, the value of improvements and the state of the account between the parties and if the tenancy continues in such circumstances without any renewal, there is no question of the kanom tenure coming to an end. The kanom remains what it was except that the jenmi has the right at any time to

file a suit for redemption or eviction. Until he does so, the tenant remains a kanomdar holding under the document and the kanom has not expired, though the period for redemption fixed in the kanom has come to an end. It is argued that reading section 25 (3) in the light of the ordinary practice in Malabar, the termination of the kanom would only be by redemption or eviction or by the grant of a renewal and that there is no basis for reading this phrase to mean anything else. The difficulty in the way of this view which impressed Horwill, J., in the case already quoted, was how to give some meaning to the provision regarding interest in section 24 (2) (*b*) and how to explain the insertion of this provision that the tenant should enjoy the holding for twelve years from the date of the termination of the previous document in section 25 (3), when in the absence of any such words the deed would naturally take effect from the date on which it was executed. The first of these two difficulties may be got over in one of two ways. It may be possible to read section 24 (2) (*b*) as merely intended to indicate that no renewal fee shall be payable before the date of the commencement of the Act, though it must be admitted that the language used is not very apt for the purpose. Alternatively this provision may be given a meaning by relating it to the lease and the kuzhikanom which also are subject to renewals. Such tenancies would normally be started by a written contract stipulating for a term. If at the end of that term the parties continued to pay and receive rents in accordance with the contract without executing any fresh document there would result a tenancy from year to year which would terminate on notice to quit. Cases might arise in which such a tenancy had been terminated by a notice to quit before the Act came into force and with reference to which a suit was pending at the time when the Act came into force. To meet such a case it would be necessary to provide that the renewal would take effect from the termination of the lease, that is to say, the termination of the tenancy from year to year and in such a case the renewal fee would become payable with effect from some date prior to the commencement of the Act. It was therefore necessary to provide that interest on the renewal fee would accrue due from the date on which the fee became due or the date of the commencement of the Act, whichever is later. It seems to us that this explanation gives a sufficient reason for the provision of section 24 (2) (*b*) consistent with the view suggested as to the meaning of the words " termination of the previous lease, kanom or kuzhikanom."

Similarly it has been contended that the words in section 25 (3) "from the date of the termination of the previous lease, kanom or kuzhikanom" are not superfluous when it is remembered that there may be a terminated lease in respect of which a notice to quit has been issued which may be renewed under this Act with effect from the date of the notice to quit. That is to say, we are asked to hold that though the date of the termination of the previous lease or kuzhikanom may be a different date from the date on which application for renewal is granted, that cannot be so in the case of a kanom tenure which will continue to subsist until it is put an end to either by eviction or by the grant of a fresh kanom in the shape of a renewal. It seems to us that this explanation of the words of section 25 (3) can be accepted without doing violence to the language and without leading to the anomalous result of requiring the tenant to take out a whole series of retrospective renewals for periods which had expired before the commencement of the Act.

We are therefore of opinion that the words " from the date of the termination of the previous kanom " must indicate the date on which a renewal of that kanom is granted. In this view it follows that the renewal granted by the Court on 18th August, 1937, will enure for twelve years thereafter and that the present suit and the application are both premature. The second appeal and the civil miscellaneous second appeal are therefore dismissed with costs.

B.V.V. ——— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

Ramija Bibi and another .. *Appellants** (*Plaintiffs*)

v.

Sharifa Bibi and others .. *Respondents* (*L.Rs. & Defts. 2 to 5*).

Mahomedan Law—Widow—Right to retain possession of her husband's properties until her mahr *is satisfied —Vendee under sale by widow to satisfy her* mahr *debt—Right to retain property—Limits.*

When a Mahomedan widow has not been paid her dower she is entitled to retain possession of her husband's properties and the properties cannot be divided among the heirs until the dower has been satisfied. So far as the Province of Madras is concerned the vendee under a sale of the estate property by a Mahomedan widow to satisfy the dower debt has the right to retain possession of the property purchased by him until the dower debt is satisfied though the sale is not binding on the other heirs of her husband.

Beeju Bee v. *Syed Moorthuza Sahib*, (1919) 37 M.L.J. 627: I.L.R. 43 Mad. 214 (F.B.), held not to have been overruled by *Maina Bibi* v. *Chaudhri Vakil Ahmad*, (1924) 48 M.L.J. 667 : L.R. 52 I.A. 145 : I.L.R. 47 All. 250 (P.C.).

Each co-sharer is however entitled to his or her share of the property on payment of his or her share of the *mahr*.

Appeal against the decree of the Court of the Subordinate Judge of Trichinopoly in A. S. No. 189 of 1940 (A. S. No. 61 of 1939, District Court, Trichinopoly) preferred against the decree of the Court of the District Munsiff of Trichinopoly in O. S. No. 202 of 1938.

K. V. Sesha Aiyangar for Appellants.

T. V. Muthukrishna Aiyar (amicus curiæ).

The Judgment of the Court was delivered by

The Chief Justice.—The question in this appeal is whether the judgment of the Privy Council in *Maina Bibi* v. *Chaudhri Vakil Ahmad*[1] has overruled the decision of the Full Bench of this Court which decided *Beeju Bee* v. *Syed Moorthuza Sahib*[2]. The answer which we give is in the negative.

In *Beeju Bee* v. *Syed Moorthuza Sahib*[2], this Court held that when a Mahomedan widow has not been paid her dower she is entitled to retain possession of her husband's properties, and that the properties cannot be divided among the heirs until the dower has been satisfied. The Court also held that while a sale by a widow of the estate property to satisfy the dower debt is not binding on the other heirs of her husband, the vendee has the right to retain possession of the property purchased by him until the dower debt is satisfied. It is the second part of this judgment which is said to have been overruled by the Privy Council in *Maina Bibi* v. *Chaudhri Vakil Ahmad*[1]. The first part of the judgment is not in any way in dispute. There is a considerable divergence of opinion in the High Courts of India on the question whether a widow is entitled to transfer her right to dower and if she does, whether the transferee is entitled to remain in possession until the debt is satisfied. No purpose will be served by discussing these conflicting authorities. The judgment in *Beeju Bee* v. *Syed Moorthuza Sahib*[2], states the law so far as this Province is concerned, unless, of course, the Privy Council decides otherwise.

In delivering the judgment of the Judicial Committee in *Maina Bibi* v. *Chaudhri Vakil Ahmad*[1], Lord Atkinson observed :

> "It was contended, as their Lordships understood, that Mussammat Maina Bibi had by the deeds of 1907 assigned both her dower debt and her right to hold possession of her husband's estate until that debt was paid. It is doubtful whether she could have done either of these things, but however that may be, it is clear she, in fact, never purported or attempted to do either of them."

Mr. Sesha Aiyangar on behalf of the appellants has pointed to the doubt which the Board expressed as to whether a widow can assign her right to hold possession of her husband's estate until the debt is paid. The judgment, however, does not go beyond expressing this doubt and it is quite clear that if the Board had dealt with

---

*S. A. No. 306 of 1942. 2nd February, 1943.

1. (1924) 48 M.L.J. 667 : L.R. 52 I.A. 145 : I.L.R. 47 All. 250 (P.C.).
2. (1919) 37 M.L.J. 627 : I.L.R. 43 Mad. 214 (F.B.).

the question more fully, their observations would have been *obiter* because the question did not arise there. An expression of doubt is a different thing from overruling, and the judgment in *Maina Bibi* v. *Chaudhri Vakil Ahmad*[1] can in no sense be said to have overruled the decision of the Full Bench in *Beeju Bee* v. *Syed Moorthuza Sahib*[2].

In the present case the Subordinate Judge held that the transferee of the widow's right was entitled to remain in possession until the whole of the dower is paid. Here he erred. It can be regarded as settled law that the plaintiffs are entitled to partition on payment of their shares of the mahr and the decree of the Subordinate Court will be varied to this extent. The decree to be drawn up in accordance with this judgment will make it clear that each co-sharer is entitled to his or her share on payment of his or her share of the mahr.

As the respondents have not appeared there will be no order as to costs.

We desire to express our appreciation of the assistance which counsel have given us and our thanks to Mr. Muthukrishna Aiyar for having acted as *amicus curiae.*

K.S. — *Decree varied.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Sri Raja Tyadapusapathi Simhadriraju Dakshanakavata Dugarajulungaru, Mokhasadar of Thonam, Salur Taluk and another .. *Petitioners** (*Petitioners*)

v.

The Unlimited Aryan Bank of Vizagapatam represented by the Official Liquidators .. *Respondent* (*Respondent*).

Madras Agriculturists' Relief Act (IV of 1938), section 3 (ii), *proviso D—Payment of kattubadi by co-sharer —Mode of fixing amount—Amount due and payable to be taken into account—Madras Agency Rules, rule 54— Power of agent to review judgment.*

The application of proviso D to section 3 (*ii*) of the Madras Agriculturists' Relief Act to the landholder of a portion of an estate would be governed not by his theoretical liability jointly and severally with his co-sharers to pay the whole of the quit rent or kattubadi regardless of the extent of his interests therein, but by the actual proportionate liability having regard to the extent which the individual sharer owns in the estate. It cannot be contended that if in a particular year or series of years the landholder manages to evade the payment of the lawful kattubadi he is not the landholder of an estate " in respect of which kattubadi is paid." In other words the criterion must not be the actual money which the Government or superior landholder succeeds in recovering but the proportionate share which the individual owner of a part of the estate has to pay in respect of the share which he owns.

Navaneetha Krishna v. *Ramanujulu Chetty*, (1941) 2 M.L.J. 159 at 161, relied on.

Under rule 54 of the Madras Agency Rules, the Agent may for sufficient cause review his own judgment or order. And the discovery of fresh and important evidence which was not available to the party at the time of the previous disposal will be a sufficient cause for review.

Petition praying that in the circumstances stated therein the High Court will be pleased to revise the order of the Court of the Agent to the Government of Madras, Vizagapatam, dated 5th September, 1941 and made in E. P. No. 1 of 1939 in I. A. No. 1 of 1940-G-2.

S. Sitarama Aiyar for *S. Vepa* for Petitioners.

C. V. Dikshitulu for *S. Suryaprakasam* for Respondent.

The Order of the Court was made by

Wadsworth, J.—This petition has been referred to the High Court under rule 59 of the Madras Agency Rules. It arises out of an application filed under section 19 of Madras Act IV of 1938 to scale down a mortgage decree. The petitioners are mokhasadars of an estate situated partly in the Agency and partly in the plains. In 1895, the first petitioner's brother mortgaged the greater portion of the estate to the respondent bank for Rs. 20,000 and some two years later he executed a further mortgage over the same properties for Rs. 3,500. In 1907, a suit was filed in the Court of the Subordinate Judge of Vizagapatam on the two

1. (1924) 48 M.L.J. 667 : L.R. 52 I.A. 145 : I.L.R. 47 All. 250 (P.C.).

2. (1919) 37 M.L.J. 627 : I.L.R. 43 M. 214 (F.B.).

*C. M. P. No. 1286 of 1942 — 2nd February, 1943.

mortgages seeking to realise the security so far as it was situated in the plains. The suit was decreed and in execution of the decree the portion of the hypotheca situated in the plains was sold for Rs. 50,100. This sale was confirmed on 27th March, 1923. This sale left a considerable balance under the mortgage decree and in 1923 a further suit O. S. No. 95 was filed in the Agency Court to enforce the mortgages against the portion of hypotheca situated in the Agency tracts. This suit was decreed in 1926, the amount of the decree being Rs. 79,624 after giving credit to the amount realised by the sale under the decree of the Subordinate Judge of Vizagapatam. An execution application was filed in 1939 under this decree and in resistance to that execution the petitioners filed an application under section 19 of Act IV of 1938. When this application first came on for trial the Agency Court held that the petitioners were agriculturists, the only evidence to the contrary then available being that they paid Rs. 63 as kattubadi on the portion of the mokhasa situated within the Agency District. After the application had been ordered, the respondent came to know that the applicants were still entitled to a certain area of the mokhasa situated in the plains which was not bound by the mortgage decree and that in respect of this area kattubadi was payable which if added to that payable in the Agency District would exclude the applicants from the benefits of Act IV of 1938 by the application of proviso D to section 3 (*ii*) of the Act. They therefore applied to the Agency Courts alleging that they had now access to documents which were not available when the matter was previously heard and requesting the Agency Court to review its judgment. This petition was allowed, an opportunity being given to both sides to adduce further evidence on the qualification of the petitioners as agriculturists. As a result of this further hearing, the Agency Court came to the conclusion that the petitioners were landholders of an estate or portion thereof in respect of which more than Rs. 100 was paid as kattubadi. Various contentions have been raised before us. Firstly it is contended that the Agency Judge had no power to review his own decision. This contention cannot be sustained in the light of rule 54 of the Madras Agency Rules whereunder the Agent may for sufficient cause review his own judgment or order. It cannot be denied that the discovery of fresh and important evidence which was not available to the party at the time of the previous disposal, is a sufficient cause for review. Further it is contended that the criterion for the application of proviso D to section 3 (*ii*) is not the amount of kattubadi which ought to be paid but the amount of kattubadi which actually is paid ; and that as the petitioners appear to have successfully evaded payment of kattubadi in respect of the area appertaining to the estate in the plains which is still in their ownership, the kattubadi payable on this portion has to be excluded in calculating their liability for the purpose of proviso D. It seems to us that this contention should be repelled. We held in *Navaneetha Krishna* v. *Ramanujulu Chetty*[1], that the application of proviso D to the landholder of a portion of an estate would be governed not by his theoretical liability jointly and severally with his co-sharers to pay the whole of the quit rent regardless of the extent of his interests therein, but by the actual proportionate liability having regard to the extent which the individual sharer owns in the estate. Applying this criterion, the amount of kattubadi paid by the petitioners would be determined by the proportion which the estate in their hands bears to the whole of the estate. It seems to us preposterous to contend that if in a particular year or series of years the landholder manages to evade payment of the lawful kattubadi he is not the landholder of an estate " in respect of which kattubadi is paid." The criterion must not be the actual money which the Government or superior landholder succeeds in recovering but the proportionate share which the individual owner of a part of the estate has to pay in respect of the share which he owns. It is contended that we should interfere with the decision of the trial Court because the proportionate share of the kattubadi payable by the petitioners has been calculated on the basis of the rental value and not on the basis of the capital value of the portion in their enjoyment. It is no doubt true that if the matter came up in an application for separate registry, the criterion for apportionment would be the " actual value " of the different portions.

1. (1941) 2 M.L.J. 159 at 161.

But even this actual value would have to be fixed on a variety of considerations one of which would doubtless be the rental value. The lower Court had to determine what was the proportionate kattubadi payable by the petitioners with reference to the materials before it. We are satisfied that a fair apportionment has been made on the basis of those materials and there are no grounds which would justify us in interfering with the trial Court's conclusion. In this view we dismiss the petition with costs with an advocate's fee of Rs. 50.

B.V.V. *Petition dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE LAKSHMANA RAO AND MR. JUSTICE KRISHNASWAMY AYYANGAR.

P. Kanakamma and another .. *Appellants** (*2nd and 3rd Defendants*)

v.

B. Krishnamma and others .. *Respondents* (*Plaintiffs*).

Transfer of Property Act (IV of 1882), section 53-A—Has no retrospective effect.

Section 53-A of the Transfer of Property Act has no retrospective effect.

Kanjee and Mooljee Bros. v. *Shanmugham Pillai*, (1932) 63 M.L.J. 587 : I.L.R. 56 Mad. 169, re-affirmed.

On appeal from the judgment and decree of the Hon'ble Mr. Justice Chandrasekhara Ayyar, dated 31st March, 1943, and passed in the exercise of the ordinary original civil jurisdiction of the High Court in C. S. No. 63 of 1941 (pauper).

E. Vinayaka Rao for Appellants.

T. C. A. Bashyam for 1st Respondent.

The Court delivered the following

JUDGMENT.—The first respondent as the heir to the estate of her deceased father sued on the original side of this Court to recover possession of two houses, one being known as No. 9, Subbarayalu Naidu Lane, and the other as No. 17, Narayana Mudali Street, G. T., Madras. The appeal is concerned only with the first mentioned property. The respondent's case is entirely devoid of merit, but the learned Judge found that in law she was entitled to possession of No. 9, Subbarayalu Naidu Lane, and accordingly passed a decree giving her possession. The learned Judge indicated, however, that no one would be more pleased than he, if, in the event of an appeal being filed, the Judges who heard it should find themselves able to arrive at a different conclusion. We appreciate the learned Judge's feelings in the matter and we regret as much as he that we feel bound to concur in the decree which he has passed.

The appeal has been placed before a Full Bench as it involves the consideration of the question whether section 53-A of the Transfer of Property Act has retrospective effect, on which there is a conflict of opinion. If the section has retrospective effect, the suit must fail, but if it has not, the judgment of the learned Judge will stand. In *Kanjee and Mooljee Bros.* v. *Shanmugham Pillai*[1], a Bench of this Court held that the section has not retrospective effect. This opinion is not shared by the High Courts of Calcutta, Bombay, Allahabad, Lahore and Patna, but after a careful consideration of the arguments, both for and against, we can see no justification for departing from the opinion already expressed by this Court.

The facts are not in dispute. Ankam Ramiah Chetty, the father of the respondent, died on the 17th March, 1901. He was survived in addition to the respondent by his widow, Seethamma, and his elder daughter, Andalamma, who was the mother of the appellants. It was the intention of Ankam Ramiah Chetty to settle on each of his daughters a house, provided that they married the bridegrooms selected by him. He died before the marriages took place, but he directed his widow to carry out his intentions. On the 12th June, 1902, his widow executed

*O. S. A. No. 42 of 1942. 2nd March, 1943.

1. (1932) 63 M.L.J. 587 : I.L.R. 56 Mad. 169.

a document in favour of Andalamma in which she agreed to convey to her the house with which this appeal is concerned, on the condition that she married Divale Venkatesaperumal Chetty, the bridegroom chosen for her by the deceased. Divale Venkatesaperumal Chetty is not a party to the appeal, but he was the first defendant in the suit. The document made it quite clear that in doing this the widow was fulfilling the wishes of her deceased husband. The marriage took place and Andalamma was given possession of the house. She lived there with her husband until she died on the 5th November, 1918, and her daughters continued in possession after her death. Unfortunately Seethamma neglected to execute a formal conveyance in favour of Andalamma and the respondent is taking advantage of this.

The respondent was married in 1911 to the husband chosen for her and in accordance with her father's wishes her mother conveyed to her a house by a deed which was duly registered, thereby giving her an indefeasible title. Seethamma died in the month of June, 1937, and on the 4th December, 1940, the respondent filed the suit to recover possession of the house from her nieces. Admittedly the respondent is now the heir of her father.

The appellants pleaded that they had acquired a title to the property by adverse possession but this plea was rejected by the learned Judge and in view of the decision of the Privy Council in *Jaggo Bai* v. *Utsavalal*[1], there can be no doubt of the correctness of the learned Judge's finding. The possession of Andalammal and her daughters was undoubtedly adverse to Seethamma, but it was not adverse to the respondent as the reversioner to her father's estate.

In these circumstances the learned advocate for the appellants asks the Court to hold that *Kanjee and Mooljee Bros.* v. *Shanmugham Pillai*[2] was wrongly decided and to accept the opinion expressed by other Indian High Courts that section 53-A of the Transfer of Property Act has retrospective effect.

Section 53-A reads as follows :

"Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract,

then, notwithstanding that the contract, though required to be registered, has not been registered or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract :

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof."

The section was inserted in the Act by the Transfer of Property (Amendment) Act, 1929. Before its amendment this Court and other Indian High Courts had applied the English doctrine of part performance, but in *Ariff* v. *Jadunath Majumdar*[3], the Privy Council held that this was wrong. The English equitable doctrine could not override the express provisions of the Transfer of Property Act. The insertion of section 53-A now applies the English doctrine to a limited extent.

Section 63 of the Transfer of Property (Amendment) Act, 1929, has an important bearing on the question whether section 53-A of the Transfer of Property Act has retrospective effect and before discussing the authorities to which we propose to refer, we will set out its provisions. The section reads as follows :

" Nothing in any of the following provisions of this Act, namely, sections 3, 4, 9, 10, 15, 18, 19, 27, 30, clause (*c*) of section 31, sections 32, 33, 34, 35, 46, 52, 55, 57, 58, 59, 61 and 62, shall be deemed in any way to affect—

(*a*) the terms or incidents of any transfer of property made or effected before the 1st day of April, 1930,

---

1. (1929) 57 M.L.J. 160 : L.R. 56 I.A. 267 : I.L.R. 51 All. 439 (P.C.).
2. (1932) 63 M.L.J. 587 : I.L.R. 56 Mad. 169.
3. (1931) 60 M.L.J. 538 : L.R. 58 I.A. 91 : I.L.R. 58 Cal. 1235 (P.C.).

(b) the validity, invalidity, effect or consequences of anything already done or suffered before the aforesaid date,

(c) any right, title, obligation or liability already acquired, accrued or incurred before such date, or

(d) any remedy or proceeding in respect of such right, title, obligation or liability : and nothing in any other provision of this Act shall render invalid or in any way affect anything already done before the first day of April, 1930, in any proceeding pending in a Court on that date, and any such remedy and any puch proceeding as is herein referred to may be enforced, instituted or continued, as the case may be, as if this Act had not been passed."

In *Delhi Cloth and General Mills Co., Ltd.* v. *The Income-tax Commissioner, Delhi*[1], the Privy Council pointed out that the Board had authoritatively enunciated in *Colonial Sugar Refining Co., Ltd.* v. *Irving*,[2] that while the provisions of a statute dealing merely with matters of procedure may properly, unless that construction be textually inadmissible, have retrospective effect attributed to them, provisions which touch a right in existence at the time of passing of the statute are not to be applied retrospectively in the absence of express enactment or necessary intendment. This principle is to be borne in mind when we are considering the effect of section 53-A. *Kanjee and Mooljee Bros.* v. *Shanmugham Pillai*[3], was decided by Beaseley, C.J. and Cornish, J. and in holding that section 53-A has not restrospective effect, they had regard to this principle and their judgment shows that they were fully aware of the implications to be drawn from the wording of the concluding portion of section 63 of the Transfer of Property (Amendment) Act, 1929.

It is not necessary to refer to all the decisions of the other High Courts which have expressed a contrary opinion to that expressed in *Kanjee Mooljee Bros.* v. *Shanmugham Pillai*[3], The arguments which have prevailed with other High Courts are sufficiently expressed in the judgment of the Bombay High Court in *Rustomji Dossabhai* v. *Bai Moti*[4], and of the Patna High Court in *Tika Sao* v. *Harilal*[5], In the former of these cases, emphasis was laid on the following words in section 63 (d) of the Transfer of Property (Amendment) Act, 1929,

"Nothing in any other provision of this Act shall render invalid or in any way affect anything already done before the first day of April, 1930, in any proceeding pending in a Court on that date, and any such remedy and any such proceeding as is herein referred to may be enforced, instituted or continued, as the case may be, as if this Act had not been passed."

Beaumont, C.J., considered that by reason of the insertion of these words the section meant that in the case of the sections enumerated at the beginning of it their provisions had no retrospective effect and did not apply to any transaction which had taken place before the 1st April, 1930, but that the provisions of the other amended sections had retrospective effect except in the case of suits pending in a Court on the 1st April, 1930. In other words, all sections which are not enumerated at the beginning of section 63 are to be deemed to have retrospective effect, except in respect of actions already pending on the 1st April, 1930.

The Transfer of Property (Amendment) Supplementary Act, 1929, was passed immediately after the Transfer of Property (Amendment) Act, 1929, as it was expedient that certain amendments should be made in other enactments. By section 10 of the later Amending Act, section 49 of the Registration Act was amended and section 15 says,

"(1) Save as provided in sub-section (2), nothing in this Act shall be deemed to affect—

(a) the terms or incidents of any transfer or disposition of property made or effected before the first day of April, 1930 ;

(b) the validity, invalidity, effect or consequences of anything already done or suffered before the aforesaid date ;

(c) any right, title, obligation or liability already acquired, accrued or incurred before such date ;

(d) any remedy or proceeding in respect of such right, title, obligation or liability ; or

(e) anything done in the course of any proceeding pending in any Court on the aforesaid date : and any such remedy or proceeding may be enforced, instituted or continued, as the case may be, as if this Act had not been passed."

1. (1927) 53 M.L.J. 819 : L.R. 54 I.A. 421 (P.C.).
2. (1905) A.C. 369.
3. (1932) 63 M.L.J. 587 : I.L.R. 56 Mad. 169.
4. I.L.R. (1940) Bom. 50.
5. (1940) I.L.R. 19 Pat. 752 (F.B.).

In the Bombay case it was argued that as the transfers there had been made before the 1st April, 1930, and had not been registered they could not be used in evidence and that the amendment of section 49 of the Registration Act had not been given retrospective effect. Beaumont, C.J., accepted the contention that the amendment of section 49 of the Registration Act was not retrospective, but he considered that there must have been a slip made in the drafting of the Amending Acts. It could not, he said, have been intended to make the amendment of the Transfer of Property Act retrospective and to make the consequential amendment of the Registration Act non-retrospective.

In *Wakefield* v. *Kumar Rani Sayeeda Khatun*[1], the Patna High Court held that section 53-A of the Transfer of Property Act has retrospective effect. The Court changed its opinion in *Jagadamba Prasad Lalla* v. *Anadinath Roy*[2], but reverted to its former opinion in *Tika Sao* v. *Harilal*[3], which was decided by a Full Bench. The last mentioned case had reference to section 92 of the amended Transfer of Property Act, but the same reasoning applies to this section as to section 53-A. The Court was not unanimous. Two of the learned Judges, Fazl Ali and Dhavle, JJ. were of the opinion that section 92 was retrospective, but Manohar Lall, J. dissented. In the course of his judgment, Fazl Ali, J. considered that if the Legislature had intended that none of the provisions of the Amending Act of 1929 should be retrospective, it was hardly necessary to insert such a long and elaborate section as section 63. He thought that it would have been enough to make a simple provision that none of the sections was to have retrospective effect or to make no provision whatsoever in this respect; because the general rule is that a new law shall not ordinarily affect past transactions.

The question whether section 92 of the Transfer of Property Act as amended by the Transfer of Property (Amendment), Act, 1929, was retrospective was discussed, by this Court in *Lakshmi Amma* v. *Sankaranarayana Menon*[4] and the opinion expressed by Varadachariar, J. was that it was not. He considered that section 63 of the Amending Act had been inserted merely as *ex majorie cautela*. It has been said by the learned advocate for the appellants that a decision on the question was not necessary in that case and that the remarks of the learned Judge must be regarded as *obiter dicta*. This is no doubt the case, but at the same time it does not detract from the weight of the opinion, which follows a similar opinion expressed by Lord Hatherly in *Gardner* v. *Lucas*[5]. In *Srinivasalu Naidu* v. *Damodarasami Naidu*[6], a Bench of this Court, consisting of Venkatasubba Rao and Abdur Rahman, JJ. expressed the same opinion, and in that case, the question did arise.

It is true that the draftsmanship of section 63 of the Transfer of Property (Amendment) Act, 1929, is open to criticism, but unless there is something in the section, or elsewhere in the. Act itself, which clearly indicates that the sections not enumerated at the beginning of the section are to be given retrospective effect, the Court must hold that they have not this effect. We do not share the opinion of the other High Courts that the proviso embodied in the concluding portion of the section is sufficient to justify the Court in holding that section 53-A has retrospective effect. If section 53-A has retrospective effect it means that all the sections which are not enumerated at the beginning of the section must be retrospective, and clearly this cannot be the case. We have only to look at the provisions of section 55 of the Transfer of Property Act, which is not one of the sections unenumerated in section 63 of the amending Act of 1929. Before its amendment in 1929, section 55 (6) (*b*) of the Transfer of Property Act said that a buyer of immoveable property was entitled, unless he had improperly declined to accept delivery of the property to a charge on it as against the seller and all persons claiming under him with notice of the payment for the amount of the purchase money properly paid by the buyer in anticipation of delivery. By section 17 of the amending Act, the words "with notice of the payment" were

1. (1936) I.L.R. 15 Pat. 786.
2. (1938) I.L.R. 17 Pat. 460.
3. (1940) I.L.R. 19 Pat. 752 (F.B.).
4. (1935) 70 M.L.J. 1 : I.L.R. 59 Mad. 359 (F.B.).
5. (1878) 3 A.C. 582 at 599.
6. (1938) M.W.N. 708.

omitted. The effect of this was to give a charge whether the subsequent purchaser had notice or not. Therefore, the section made a material alteration in rights and such an alteration cannot be given retrospective effect, if regard must be had to the principle stated by the Privy Council in *Delhi Cloth and General Mills, Co., Ltd.* v. *The Income-tax Commissioner, Delhi,*[1] and *Colonial Sugar Refining Co., Ltd.* v. *Irving*[2], as it must. This factor was not sufficiently taken into consideration in any of the judgments which run counter to *Kanjee and Mooljee Bros.* v. *Shanmugham Pillai*[3], and we regard it as the deciding factor.

Support for this opinion is to be found in the judgment of the Privy Council in *M.M.R.M. Chettiar Firm* v. *S.R.M.S.L.Chettiar Firm.*[4] In that case, the appellant firm purchased from the first respondent lands of which the second and third respondents were in possession, and the appellant firm brought a suit to recover possession from them. The defence was that the defendants had agreed to buy the lands, but this contract was cancelled on the condition that they should remain in possession until the owner had repaid them the amount which he had received from them towards the purchase price. The only question in the trial Court was whether there had been a novation of contract. The trial Judge held that they had failed to prove a novation. On appeal to the Rangoon High Court, it was contended by the respondents that they were entitled to a charge by reason of the provisions of section 55 (6) (*b*) of the Transfer of Property Act, and this plea was accepted. The Privy Council held that the High Court was not justified in giving effect to this new contention. In delivering the judgment of the Board, Lord Thankerton said :

"The only case submitted to the District Judge was a simple one and it was not inaccurately described as a case of novation, *viz.*, the cancellation of the original contracts of sale and the substitution of the new agreement of 30th May, 1924, in their place. In the opinion of their Lordships, the learned Judges of the High Court were not justified on the failure of this simple issue, in entertaining the question of a statutory charge, as, owing to its absence from the pleadings and the issues, two important issues of fact, which were essential to its success, had not been considered. These two questions are (*a*) whether the buyer has improperly declined to accept delivery of the property, (*b*) whether the appellant firm, as a transferee from the seller prior to the Amending Act of 1929 had "notice of the payment." These words were taken out in 1929. It cannot be suggested that the evidence, which was directed to the somewhat inconsistent case of cancellation of the sale contract and a new agreement, contains the material on which, with any justice, these two matters can be determined."

The Judicial Committee did not deal expressly with the question whether the amendment to the section had retrospective effect, but their decision indicates that in their Lordships' opinion it had not. The question of notice could only arise before the amendment.

For these reasons, we hold that *Kanjee and Mooljee Bros.* v. *Shanmugham Pillai*[3], was rightly decided and consequently this appeal must be dismissed. It is an unfortunate situation, but the Court must decide the case in accordance with the wording of the statute. The unsisterly conduct of the respondent is lamentable, but the law is on her side. She must be given possession of the house and left to reconcile her action with her conscience, should she ever acquire one.

The appeal will be dismissed, but in the circumstances we make no order as to costs.

K.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Kondapalli Sudarsana Rao .. *Appellant** (*1st Defendant*)

v.

Putta Dalayya .. *Respondent* (*Plaintiff*).

Guardian and Ward—Hindu minor—Covenant entered into by guardian to pay maintenance to minor's grandmother—Arrears of maintenance—Decree for can be passed against the estate of the minor.

1. (1927) 53 M.L.J. 819 : L.R. 54 I.A. 421 (P.C.).
2. (1905) A.C. 369.
3. (1932) 63 M.L.J. 587 : I.L.R. 56 Mad. 169.
4. (1941) 46 C.W.N. 57 (P.C.).

*S. A. No. 1216 of 19141. 2nd March, 1943.

Madras Act (IV of 1938), section 4 (g)—Protection under if extends to assignee of right to arrears of maintenance.

A contract entered into by the natural father of a minor boy given in adoption, as his guardian agreeing to pay maintenance to the adoptive grandmother of the minor is binding on the minor and warrants a decree being passed against the minor's estate for arrears of such maintenance.

Ramajogayya v. *Jagannadam*, (1918) 36 M.L.J. 29 : I.L.R. 42 Mad. 185 (F.B.), *Annamalai* v. *Muthuswami*, (1939) 1 M.L.J. 792 : I.L.R. (1939) Mad. 891, *Ramanatha* v. *Palaniappa*, I.L.R. (1939) Mad. 776, relied on.

Zamindar of Polavaram v. *Maharajah of Pittapur*, (1936) 71 M.L.J. 347 : L.R. 63 I.A. 304 : I.L.R. 59 Mad. 910 (P.C.), considered.

The wording of clause (*g*) of section 4 of Madras Act IV of 1938 is wide enough to cover the claims not only of persons who are entitled to be maintained but also of assignees from them of their right to recover arrears of maintenance and affords protection to all persons who seek to enforce a liability arising out of a non-fulfilment of an obligation to maintain.

Appeal against the decree of the District Court of Vizagapatam in A. S. No. 60 of 1939, preferred against the decree of the Court of the Subordinate Judge of Chicacole in O. S. No. 4 of 1938.

C. S. Venkatachari and *D. Ramaswami Aiyangar* for Appellant.

B. V. Subramaniam for Respondent.

The Judgment of the Court was delivered by

Patanjali Sastri, J.—The facts giving rise to this second appeal are simple and not in dispute. One Appanna Dora died in 1906 having executed a will whereby he gave his widow power to adopt. The widow adopted the appellant in 1913 when he was still a minor. The natural father of the appellant acting as his guardian executed a deed of maintenance in favour of Ammanna , the mother of Appanna, on 13th April, 1914, agreeing to pay her maintenance at the rate of seven garces of paddy every year with interest at the rate of two addas per putti per month in case of default of payment on the due date. Ammanna assigned to the respondent herein the arrears of maintenance due for the four years from Promoduta to Sreemukha (both inclusive) under two assignment deeds dated 21st January, 1933, and 24th September, 1934, respectively, whereupon the respondent brought the suit for recovery of the arrears with interest, impleading the appellant who had attained majority as the first defendant and his natural father who executed the maintenance deed and his adoptive mother as defendants 2 and 3 respectively, but praying for a decree only against Appanna's estate now in the hands of the appellant. The learned Subordinate Judge of Chicacole who tried the suit decreed the claim, and the decree has been affirmed by the District Judge of Vizagapatam. Hence this second appeal.

Only two questions have been argued before us by Mr. Venkatachari for the appellant. He has urged, in the first place, that the contract entered into by the appellant's guardian during his minority to pay maintenance at the rate specified in the maintenance deed cannot bind the appellant personally, and that in the absence of a personal liability the decree passed against his properties is unsustainable. This contention is, however, opposed to the decision of a Full Bench of this Court in *Ramajogayya* v. *Jagannadham*[1], and to several other decisions which have followed that Full Bench ruling, where it has been held that a decree can be passed against a minor's estate on a contract entered into on his behalf by his guardian if the estate would have been liable for the obligation incurred by the guardian under the personal law to which he is subject. It is not denied in this case that the appellant is liable under his personal law, *i.e.*, the Hindu Law, to maintain his paternal grandmother Ammanna. The covenant to pay her maintenance entered into by his guardian during his minority is therefore, according to the decisions referred to above, binding upon the appellant and warrants the decree that has been passed by the Courts below. Mr. Venkatachari admitted that this would be the position but for the subsequent decision of the Privy Council in *Zamindar of Polavaram* v. *Maharajah of Pittapur*[2], which, he maintained, has superseded these decisions. That was a case where it was found that a mortgage executed by the guardian of a minor

1. (1918) 36 M.L.J. 29 : I.L.R. 42 Mad. 185 (F.B.).

2. (1936) 71 M.L.J. 347 : L.R. 63 I.A. 304 : I.L.R. 59 Mad. 910 (P.C.).

was invalid as it was not attested as required by law, but this Court gave a decree against the minor's "general assets" on the basis of the guardian's covenant to pay contained in the mortgage deed, as it was not disputed for the minor that the guardian entered into the transaction for a purpose which under the Hindu Law would make it binding on the minor—see *Zamindar of Polavaram* v. *Maharajah of Pittapur*[1]. The learned Judges followed the Full Bench ruling referred to above. The decision of the Privy Council in *Zamindar of Polavaram* v. *Maharajah of Pittapur*[2] was given on two consolidated appeals preferred from the decree of this Court made as aforesaid, one by the plaintiff who sought a decree for sale on the footing that the debt was a secured debt and the other by the defendant seeking to have the decree passed against his "general assets" set aside. We are not concerned, for the purposes of this case, with their Lordships' decision in the appeal preferred by the plaintiff. As regards the appeal preferred by the defendant the decision on which alone is material here, their Lordships disposed of it with these observations,

"They (*i.e.*, the High Court) also found that, as the defendant was a minor at the time of the transaction in question, he could not be held personally responsible for the payment of the debt. This finding has not been contested, and, as the claim for the personal liability of the defendant is negatived, the plaintiff is not entitled to recover the money from the 'general assets' of the defendant."

They accordingly set aside the decree passed by this Court against the "general assets" of the defendant and gave the plaintiff a charge decree as prayed for by him in his appeal. Mr. Venkatachari placed strong reliance upon the passage quoted above as showing that the view expressed by the majority of the Full Bench in *Ramajogayya's case*[3] and relied on by this Court in support of the decree which was set aside by their Lordships was erroneous and can no longer be regarded as good law. Mr. Venkatachari also drew our attention to the fact that *Ramajogayy's case*[3], was referred to by learned counsel for appellant before their Lordships, although no reference was made to it in their judgment, and submitted that the decision must be deemed to have been overruled by necessary implication. It is no doubt true that the decree granted by this Court against the "general assets" of the minor was based upon the decision of the majority of the Full Bench in *Ramajogayya's case*[3], and that it was vacated by their Lordships. But after a careful reading of the judgments of the learned Judges in *Zamindar of Polavaram* v. *Maharajah of Pittapur*[1], we are unable to discover any warrant for the view that the learned Judges found that the defendant could not be held personally responsible for the payment of the debt incurred by his guardian during his minority. This position, however, appears to have been conceded before their Lordships and it was held to follow as a corollary, that the plaintiff could not get a decree against the "general assets" of the defendant. We find it difficult to accept the suggestion that the brief pronouncement made on such a view of the matter presented to their Lordships was intended to overrule the Full Bench decision in *Ramajogayya's case*[3]. We share the view expressed in the latest edition of Mayne's Hindu Law with reference to the decision of their Lordships.

"In *Zamindar of Polavaram* v. *Maharajah of Pitapur*,[2] the Privy Council, reversing the decision of the Madras High Court, held that where a minor is not personally responsible for the payment of the debt, no decree against the 'general assets' could be given. It does not however appear that the Privy Council intended to overrule the decision in *Ramajogayya's case*[3], which was cited before it. The observations probably proceeded on the special facts of the case."

The Full Bench ruling has been regarded as settled law in this Presidency, and even after their Lordships' decision in *Zamindar of Polavaram* v. *Maharajah of Pittapur*[2], has been followed by two different benches of this Court, namely, by the Chief Justice and Krishnaswami Ayyangar, J., in *Annamalai* v. *Muthuswami*[4], and by Pandrang Row and Krishnaswami Ayyangar, JJ., in *Ramanatha* v. *Palaniappa*[5], though, it must be admitted, the decision of the Privy Council was not referred to in these cases as it was considered, presumably not to have the effect now sought to be attributed to it. These subsequent decisions are in any case binding upon us and

1. (1930) 60 M.L.J. 56 : I.L.R. 54 Mad. 163.
2. (1936) 71 M.L.J. 347 : L.R. 63 I.A. 304 : I.L.R. 59 Mad. 910 (P.C.).
3. (1918) 36 M.L.J. 29 : I.L.R. 42 Mad. 185 (F.B.).
4. (1939) 1 M.L.J. 792 : I.L.R. (1939) Mad. 891.
5. I.L.R. (1939) Mad. 776.

we cannot agree with Mr. Venkatachari that they should be disregarded as not laying down the law correctly. Following these decisions we must hold that the decree passed by the Courts below directing that the amount claimed by the respondent should be recovered from the properties in the hands of the appellant is in accordance with law.

The second contention of Mr. Venkatachari relates to the appellant's claim to have the liability in question scaled down in accordance with the provisions of the Madras Agriculturists' Relief Act. It is not disputed that the appellant is an agriculturist within the meaning of that Act. But the appellant's claim to relief thereunder is resisted by the respondent on the ground that the liability is exempted from the operation of the Act by section 4 (*g*) which enacts,

"Nothing in this Act shall affect debts and liabilities of an agriculturist falling under the following heads:

* * * *

(*g*) any liability in respect of maintenance whether under decree of Court or otherwise."

Mr. Venkatachari contends that this provision covers only liabilities due to a person who is entitled to be maintained and is inapplicable to the claim of an assignee of arrears of maintenance who can recover the amount only as an ordinary debt due to him. In support of this contention Mr. Venkatachari drew attention to the several clauses of this section where exemption is obviously based upon grounds which have reference to the individual character or status of the creditor. While this is true in the case of many of the exemptions referred to in the section, it is also clear that in some cases the exemption is not based on such grounds. In clause (*f*) for instance, the exemption is grounded upon the origin of the liability and in clause (*d*) upon the nature of the security. It cannot, therefore, be said generally that the exemptions in section 4 are grounded upon the character or status of the creditor. We consider that the wording of clause (*g*) is wide enough to cover the claims not only of persons who are entitled to be maintained but also of assignees from them of their right to recover arrears of maintenance. If the protection were held to be purely personal to the maintenance holder, it would make it difficult for the latter to assign the arrears to another person, when the person bound to pay the maintenance failed to do so. It seems to us more reasonable to construe the clause as extending the protection to all persons who seek to enforce a liability which arose out of a non-fulfilment of an obligation to maintain. It follows that the appellant is not entitled to claim that the liability sued for should be scaled down under the Act.

The appeal fails and is dismissed with costs.

K.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MOCKETT.

The Public Prosecutor .. *Appellant**

v.

N. Venkatarama Naidu .. *Respondent (Accused).*

Evidence Act (I of 1872), sections 159 and 160—Shorthand writer stating that transcript filed was a correct statement of a speech by the accused—Sufficiency to prove the speech complained of as prejudicial under the Defence of India Rules.

The accused was charged under clause (6) of the Defence of India Rules with having made a "prejudicial speech" at a Peasants' Conference. The Sub-Inspector of Police who attended and took shorthand notes gave evidence in which he said "The accused made a speech about the war and political events. Ex. A is the shorthand note I took down. I transcribed it into Telugu. Ex. B is the transcription. Ex. C is the translation of the speech. In hoisting the red flag he made the speech. The effect this speech had on the audience was to incite them with revolutionary ideas". The effect of the cross-examination was to establish that the witness was a competent shorthand writer and that he did make a careful note of the speech.

Held, that such a witness should describe his attendance and the making of the relevant speech and give a description of its nature so as to identify his presence there and his attention to what was going on. After that it is quite enough if he says, "I wrote down that speech and this is what I took down". It is a question of fact on the evidence in each case whether the Court is satisfied that it has before it a correct statement of the speech.

---

* Cr. A. No. 744 of 1942. 18th February, 1943.

Appeal under section 417 of the Criminal Procedure Code, 1898, against the acquittal of the aforesaid respondent (accused) by the Joint Magistrate of Chandragiri in C. C. No. 72 of 1942 on his file on the 15th September, 1942.

The Appellant in Person.

V. S. Chandrasekharan for Respondent (Accused).

The Court delivered the following

JUDGMENT.—The Provincial Government appeals against the acquittal of one Venkatarama Naidu for an offence under Clause 6 of the Defence of India Rules. It is alleged that offences under sub-clauses (*e*),(*f*),(*g*) and (*k*) were committed. The accused made a speech on the 26th April, 1942, at Pedda Kammapalle at a peasants' conference at which a thousand people or so were present, and it is said that the speech involved bringing into hatred and contempt,or excited dissatisfaction towards His Majesty's Government, that it went to promote feeling of enmity and hatred between the ryots and zamindars and proprietors who are subjects of His Majesty; that it caused fear and alarm to the public and that it influenced the conduct of the public to the efficient prosecution of the present war. The speech in my view taken as a whole unquestionably went far beyond the bounds of legitimate discussion and criticism. It begins by a description of the zamindars as devils and cheats and thieves, and it threatens the police with the strength of the peasants pointing out that they could at any time have their turbans and badges removed and also be dismissed. Throughout the meeting it called upon its listeners to destroy the Government. The speaker is a little inconsistent because, although at the beginning of his speech he prefers the presence of the Japanese or Germans to that of the present regime, nevertheless at the end he says he would fight Hitler or the Japanese and drive them away. But owing to this constant incitement to destroy the Government and the zamindars and proprietors and establish another Government it is in my view as clear as can be that the offence charged was committed by the speech taken as a whole.

Learned counsel for the respondent has had great difficulty in arguing otherwise. But the Magistrate has acquitted the accused mainly on the following ground, and has not been so much concerned with the nature of the speech. The evidence was that of a shorthand Sub-Inspector, an expert in Telugu shorthand, who attended the meeting. He says that the accused made a speech about the war and political events. " Ex. A is the shorthand note I took down. I transcribed it into Telugu. Ex. B is the transcription. Ex. C is the translation of the speech. In hoisting the red flag he made the speech. The effect this speech had on the audience was to incite them with revolutionary ideas." The effect of the cross-examination was to establish quite clearly that he was a competent shorthand writer and that he did make a careful note of the speech. The Magistrate has however held that by reason of a decision of the Lahore High Court the speech was not satisfactorily proved. The decision in question is that of Blacker, J., reported in *Pindi Das* v. *Emperor*[1]. The learned Judge relied on an observation of Jailal, J., in the case reported in *Jagannath* v. *Emperor*[2], and it reads as follows:

"A witness who professes to prove something spoken by another is expected to repeat in the witness box what the latter has actually stated. He can of course refresh his memory by referring to any writing made, or any notes taken down by him at the time when the speech was made. He can also use such writing or notes to corroborate his oral testimony. In some cases it is open to a witness merely to refer to a document and to say that it contains a correct statement of what happened in his presence; but in that case he must depose that he is unable to state from memory what happened as owing to lapse of time and other circumstances he has forgotten it and further that he correctly recorded in the document what he had heard or witnessed. In such cases that document itself becomes primary evidence in the case."

In this case P. W. 1 the shorthand Sub-Inspector was deposing on the 20th May, 1942, as to what was said in a speech on the 26th April, nearly a month before. I am not prepared to agree that under such circumstances the omission of a witness to state that he is unable from memory to recite a speech which covered twenty minutes a month before is of importance. Quite obviously nobody could pretend to

1. A.I.R. 1938 Lah. 629.

2. A.I.R. 1932 Lah. 7.

do such a thing. If he said he could, nobody would believe him. No decisions of the Madras High Court have been cited. In my view it is a question of fact on the evidence in each case as to whether the Court is satisfied that it has before it a correct statement of the speech. Under section 159 of the Indian Evidence Act notes of the speech can be used to refresh the memory of the shorthand writer witness. The shorthand writer can of course only say, "I took down a speech and the result is in my shorthand note book, and this is what he said." Under section 160 it must be observed that a witness may also testify to facts mentioned in any such document, that is to say, any document mentioned in section 159 (which would include the shorthand notes and its transcription) although he has no specific recollection of the exact facts, *i.e.*, exact words if he is sure the facts (words) were correctly recorded in the document. Applying that to the present case the effect of the evidence of the shorthand Sub-Inspector was that he attended the meeting that he took down the speech (and he gave a resume of the speech) and he stated that what was before the Court was a correct representation of the speech. I do not think there is so much room for technicality in a matter of this sort as the Magistrate supposes. In another decision of the Lahore High Court reported in *Om Prakash* v. *Emperor*[1], Tapp, J., held that notes of a speech taken by a police officer at the time can be admitted in evidence and it was not necessary that the officer should be made to testify orally after referring to those notes. I would prefer that the police officer should describe his attendance, the making of the relevant speech and give a description of its nature so as to identify his presence there and his attention to what was going on. After that I think it is quite enough if he says, "I wrote down that speech and this is what I took down." After that it seems to me that the prosecution will be in a position to say that they have to the best of their ability proved the words said to have been uttered. It is possible by cross-examination and contrary evidence to show that the shorthand note is inaccurate. From the prosecution point of view, I do not see what more they can do. It is unnecessary to follow the Magistrate through his minute criticisms. The Magistrate was so occupied with a consideration of extremes of technicality with regard to the proof of this speech that he seems to have lost sight of what I will describe as the commonsense view of the matter and never really applied his mind to the proper test, *viz.*, had it been proved that the observations of the accused were correctly contained in the exhibit professing to be the translation of his speech. It might (especially in this case) be emphasised that commonsense and law are not strangers to each other. That test applied, there can only be one answer, because the evidence seems to be all one way.

That being so, having held that the speech was proved and that on the face of it, it is obviously an offence against the relevant provisions of the Defence of India Rules, I have no alternative except to allow the appeal of the Crown and convict the accused of the offence charged. With regard to sentence, the accused is a detenue. He has put in an apologetic statement and has expressed a desire to withdraw his speech if it is thought to be inflammatory. It is unnecessary to do more than pass a sentence in vindication of the law. Had he persisted in the view that this was a proper speech, it might have been necessary to pass a very severe punishment. But in the view of his present status as a detenue and in view of his apology I think it is unnecessary to do more than to pass a sentence of two months' simple imprisonment which period must necessarily coincide with his detention.

K.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Kuppuswami Naidu .. *Petitioner* (Accused).*

Motor Vehicles Act (IV of 1939), section 71 (2)—Fixing of speed limit—Publication in District Gazette is not publication in Official Gazette.

---

1. (1930) 127 I.C. 209.

*Cr. R. C. No. 34 of 1943. (Cr. R. P. No. 32 of 1943). 12th March, 1943

The fixing of the speed by the Road Transport Board is the publication in the Official Gazette. The District Gazette is not the Official Gazette as defined in the General Clauses Act, section 37-A and publication in it is not fixing the speed limit by the Road Transport Board.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the City First Class Magistrate, Madura, in Calendar Case No. 244 of 1942, dated 29th September, 1942.

C. K. Venkatanarasimham for Petitioner.

K. Venkataraghavachariar for the Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—The petitioner has been convicted for exceeding by a few miles per hour the speed limit fixed by the Road Transport Board just outside Madura on the Madura-Dindigul Road.

The first point raised in this petition is that the Road Transport Board has not 'fixed' the speed of 15 miles an hour—which the petitioner is said to have exceeded—within the meaning of section 71 (2) of the Motor Vehicles Act. It has been held in several decisions of this Court that the fixing of the speed by the Board is the publication in the Official Gazette. The expression 'Official Gazette' is defined in the General Clauses Act, section 37-A, as meaning the Gazette of India or, as the case may be, the Official Gazette of the province—which, in this Presidency, would mean the Fort St. George Gazette. It is admitted by the prosecution that there has been no publication in the Fort St. George Gazette but only in the District Gazette. As there has been no publication in the Official Gazette, the speed limit for this area was not fixed by the Road Transport Board. It follows that the petitioner was not guilty of exceeding the speed 'fixed' by the Road Transport Board and ought not therefore to have been convicted.

The petition is allowed and the conviction and sentence set aside. The fine will be refunded.

K.S. *Petition allowed.*

[THE FEDERAL COURT OF INDIA.]

[Original Jurisdiction.]

PRESENT :—SIR MAURICE GWYER, *Chief Justice*, MR. JUSTICE VARADACHARIAR AND MR. JUSTICE AMEER ALI.

Governor-General in Council .. *Plaintiff**

v.

The Province of Madras .. *Defendant.*

Madras General Sales Tax Act (IX of 1939)—Constitutional validity.

The Madras General Sales Tax Act is *intra vires* the Madras Legislature.

Province of Madras v. *Boddu Paidanna and Sons*, (1942) 2 M.L.J. 327 (F.C.), followed.

Sir Brojendra Mitter, Advocate-General of India (*H. R. Kasimi*, Advocate, Federal Court, with him) instructed by *K. Y. Bhandarkar*, Agent, Federal Court, for Plaintiff.

Sir Alladi Krishnaswami Aiyar, Advocate-General, Madras (*N. Rajagopala Aiyangar*, Advocate, Federal Court, with him) instructed by *B. Banerji*, Agent, Federal Court, for Defendant.

Sir Asoka Roy, Advocate-General of Bengal (*H. K. Bose*, Advocate, Federal Court, with him) instructed by *B. Banerji*, Agent, Federal Court, for the Province of Bengal.

Raghbir Singh, Advocate, Federal Court, instructed by *S. K. Achariar*, Agent, Federal Court, for Boddu Seetharamaswami.

The Judgment of the Court was delivered by

The Chief Justice.—In this case the Governor-General in Council brings an action against the Province of Madras for a declaration that the Madras General

*Case No. 15 of 1942. 1st March, 1943.

Sales Tax Act, 1939, is an encroachment upon the rights of the Central Legislature. Under that Act, a tax is levied on the sale of goods in the Province of Madras; and it is contended on behalf of the Government of India that, so far as sales by a producer or a manufacturer are concerned, the tax is a duty of excise and therefore within the exclusive competence of the Central Legislature to impose by virtue of entry No. 45 of List I in the Seventh Schedule to the Constitution Act. It is contended on behalf of the Government of Madras that the tax is a tax on the sale of goods within the competence of the Provincial Legislature by virtue of entry No. 48 of List II in the Seventh Schedule, and that there is no reason for distinguishing the first sale of goods produced or manufactured in the Province from the second or any subsequent sale. The validity of the Act, so far as concerns first sales, was challenged in the case *The Province of Madras* v. *Boddu Paidanna and Sons*[1], which came before this Court on appeal from the High Court of Madras last year, and the judgment of the Court, disagreeing with the judgment of the High Court, was in favour of the Province. The Advocate-General of India, who appeared on behalf of the plaintiff in the present case, stated that he was unable to contend that the decision of the Court in *The Province of Madras* v. *Boddu Paidanna and Sons*[1] did not govern the present suit, and that he did not think that he should be able to persuade this Court that their earlier decision was incorrect. In these circumstances he informed us that he would submit, though he could not consent, to judgment being entered against him. He frankly stated that, the Court having refused the application by the respondents in *Boddu Paidanna and Sons* v. *The Province of Madras*[2] for leave to appeal to His Majesty in Council, he desired to test elsewhere the decision of the Court, as under section 208 (*a*) of the Constitution Act, he has the right to do without asking for leave.

We agree that substantially the same issue is raised in the present suit as in the appeal last year and we see no reason to modify the decision which we then gave.

The Advocate-General of Madras, who appeared on behalf of the defendant, in asking for judgment, stated that he must not be taken as abandoning the contention which he had raised in his pleading that, notice of the proceedings in the earlier case having been given to the Advocate-General of India under Order 36, rule 1 of the Federal Court Rules, and the Advocate-General having appeared and argued against the validity of the tax in that case, it was no longer open to the Governor-General in Council to challenge in those proceedings the earlier decision of the Court. He drew attention in this connection to certain observations made by the Court in the case of *The United Provinces* v. *Atiqa Begum*[3].

An application was also made by the Advocate-General of Bengal under Order 36, rule 2 of the Federal Court Rules for leave to be heard; but, in view of the course which the proceedings in the case have taken, it has not been necessary to hear him.

Mr. Raghbir Singh, on behalf of Boddu Seetharamaswami, senior partner and agent of the firm who were respondents in the case *The Province of Madras* v. *Boddu Paidanna and Sons*[1], applied to be made a party to the proceedings under Order 19, rule 3 of the Federal Court Rules, as a person interested in the final result of the case. He invited us to give a ruling as to the circumstances in which a person alleging an interest in litigation between one Province and another or between the Central Government and a Province might be added as a party to a litigation. We reject Mr. Raghbir Singh's application to have his client added as a party, and we do not think it necessary to give any ruling on the general question of the interpretation of Order 19, rule 3 of the Federal Court Rules, as he invited us to do.

There will be judgment for the defendant with costs.

K.S. ——— *Judgment for defendant.*

1. (1942) 2 M.L.J. 327 (F.C.).
2. (1942) 2 M.L.J. 797: (1943) 5 F.L.J. 95.
3. (1940) F.C.R. 110: 3 F.L.J. 97.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

The Secretary of State for India in Council by its Agent the Collector of Kistna at Masulipatam.. *Appellant** (*1st Defendant*)

v.

Srimanthu Rajah Yarlagadda Sivarama Prasad Bahadur Zamindar Garu and others .. *Respondents* (*Plffs. and Defts.*).

Madras Irrigation Cess Act (VII of 1865), section 1, proviso I—Stream directly fed by rains remaining dry for part of the year—If ceases to be a natural river—Connection of such stream with anicut constructed by Government —Water used for irrigation by riparian owner—Liability for water cess.

A river may be fed by the rains directly, without any intermediate collection of the water in the bowels of the earth, and still be a river; and a river which naturally runs during the greater part of the year does not cease to be a river merely because at times it is accustomed to become dry.

Stollmeyer v. *Trinidad Lake Petroleum Company,* (1918) A.C. 485 (P.C.), relied on.

An owner of land upon a bank of such a stream has all the rights of a riparian owner as understood in English law. Where such a natural stream was connected with an anicut constructed by the Government and in fact, for a part of the year the whole of the water in the stream came from the anicut, the Government by reason of the flow of water into the stream from the anicut, is entitled under the Madras Irrigation Cess Act, section 1 and the first proviso thereto, to levy water cess in respect of all water withdrawn by the riparian owner for irrigation purposes notwithstanding that he owns the bed and both the banks. The Irrigation Cess Act is not concerned with the question whether the water had or had not become the property of the person using it.

Case-law discussed.

Appeals against the decree of the Court of the Subordinate Judge of Masulipatam, dated 5th July, 1937, and passed in O. S. No. 25 of 1935.

The Government Pleader (*K. Kuttikrishna Menon*) for Appellant.

The Advocate-General (*Sir A. Krishnaswami Ayyar*), *V. Govindarajachari, K. Umamaheswaran, P. S. Raghavarama Sastri, K. Raghuramiah, K. Kuppuswami, S. B. P. Pattabhirama Rao* and *P. Chandra Reddi* for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—The suit out of which these appeals arise was filed in 1927 by Rajah Yarlagadda Ankineedu Prasad, the proprietor of the Devarakota zamindari, which is in the Kistna District, to establish rights claimed by him in a stream which flows through the estate. The water from this stream is used by the zamindar and his tenants for irrigation purposes. The Government of Madras has always claimed the right of levying cess in respect of water so used and until after the plaintiff had succeeded his father as the zamindar, the justice of the claim was recognised. The plaintiff's father died in 1921. For faslis 1334, 1335 and 1336 which correspond to the years 1924-25, 1925-26 and 1926-27, the Government required the plaintiff to pay in the aggregate Rs. 1,952-14-4, as water cess in respect of lands irrigated from this stream. The plaintiff decided to challenge the legality of the Government's demand for water cess and in his plaint he asked for a decree for repayment of the Rs. 1,952-14-4 with interest at 9 per cent. per annum, in all Rs. 2,237-11-8; for a declaration of his rights in the stream and its tributaries; and for an injunction restraining the Government from interfering with the rights claimed by him and from exercising or asserting any right in respect of the stream or its tributaries within the limits of the zamindari. The plaintiff died during the pendency of the suit, which was continued by his son, the first respondent in Appeal No. 33 of 1938 and the appellant in Appeal No. 60 of 1938, who, on his father's death, became the holder of the estate. In the trial Court the original plaintiff was referred to as the first plaintiff and the present plaintiff as " the second plaintiff," and it will be convenient to continue these descriptions.

The Subordinate Judge of Masulipatam, who tried the suit, held that the second plaintiff had " full rights " in the stream and its feeders within the limits of the estate and that he was entitled to use the water subject to the liability to

*Appeals Nos. 33 and 60 of 1938. 16th December, 1942.

pay cess in respect of water used in excess of what was required to irrigate an area of 2,724.57 acres of cultivated land. With regard to this area the Subordinate Judge found that a permanent exemption from the payment of water cess had been granted in 1867. He refused to grant a decree for a refund of the Rs. 2,237-11-8, but directed that the injunction asked for should issue. The Secretary of State for India in Council has preferred Appeal No. 33 of 1938 from the decree passed by the Subordinate Judge. He contends that the Subordinate Judge erred in holding that the second plaintiff was entitled to exemption from water cess in respect of the 2,724.57 acres and in issuing the injunction. The second plaintiff, as the appellant in Appeal No. 60 of 1938, contends that the Subordinate Judge should have held that he was entitled to withdraw water from the stream for irrigation purposes without any liability at all for water cess and therefore is entitled to a refund.

In the year 1854, the Government of Madras carried through a scheme for the irrigation of agricultural lands in the Kistna district. A bund was built across the Kistna river at Bezwada and channels were constructed to conduct the flow of water so arrested to the areas intended to be benefited. The stream with which this suit is concerned has several names. In the judgment it is referred to as "the Gunderu," but it is also known as the "Kannikalamadugu" and in this Court it has been referred to as "the Kannikalamadugu," as that is the name given to it in some of the important maps. The stream commences near Devarapalle in the Vallur estate, which lies to the north of the Devarakota estate. Formerly the "Kannikalamadugu" ran into an arm of the Kistna, known as the Puligadda, which lies to the south of the zamindari. It no longer flows into the Puligadda, but continues eastwards until it joins the sea near Masulipatam. An important question in this case is whether the Government of Madras stopped the flow into the Puligadda and constructed an artificial channel to conduct the water to the sea or whether the "Kannikalamadugu" forced its own way to the sea near Masulipatam. It is common ground that when the Kistna anicut was constructed the "Kannikalamadugu" was connected with it and that it has remained connected with it ever since.

The case for the Secretary of State for India in Council both in the trial Court and here has been that the "Kannikalamadugu" was never a natural stream, but merely a depression in the land through which rain water drained off during monsoon seasons and but for the connection with the anicut it would be dry for a great part of the year. This contention was not accepted by the Subordinate Judge, who held that the "Gunderu," as he preferred to call it, was a natural stream, and we consider that he was fully justified in his opinion. The Kistna district of the Madras Presidency receives the benefit of both the south-west and north-east monsoons and therefore before the stream was connected with the anicut there must have been a flow of water in it for several months in the year. For the rest of the year it was no doubt dry, but this would not make it any the less a natural stream. In *Stollmeyer* v. *Trinidad Lake Petroleum Company*[1], the Privy Council held that a river may be fed by the rains directly, without any intermediate collection of the water in the bowels of the earth, and still be a river, and a river which naturally runs during the greater part of the year does not cease to be a river merely because at times it is accustomed to become dry. An owner of land upon a bank of such a stream has all the rights of a riparian owner as understood in English law. Since the connection with the anicut has been in existence, the stream in suit flows for most of the year. In the trial Court both sides attempted to prove what proportion of the water came from the anicut and what proportion could be attributed to rainfall, but eventually they decided that it was not possible to form a reliable estimate and agreed that the proportions were not of importance. It is obvious, however, that a considerable proportion of the water in the stream does come from the anicut.

It is common ground that the stream belongs to the Government from point *R* on the map marked as Ex. LXXIX down to the sea, because the Government made the waterway from that point. Point *R* is near the boundary of the Devara-

1. (1918) A.C. 485 (P.C.).

kota estate at its south-east corner. The Government claims that the stretch between point *P* and point *R* is also its own property, for the reason that the works which it had carried out commenced at point *P*. The second plaintiff claims that the works undertaken by the Government only commenced at point *R* and the claim was upheld by the Subordinate Judge. Between points *P* and *R* the Government has permitted pumps to be erected for the withdrawal of water from the stream for the purposes of irrigation of lands lying in the neighbourhood. The second plaintiff says that this infringes his rights as the riparian owner of the stream between points *P* and *R*. Before deciding what are the rights of the parties to that part of the stream which flows from the anicut to point *P*, it will be convenient to decide whether the works undertaken by the Government commenced at point *P*, or only at point *R*. If they commenced at point *P* admittedly the second plaintiff will have no rights in the stream below that point, and the extent of his rights above point *P* will depend on whether the provisions of the Madras Irrigation Cess Act apply.

[After discussing the evidence, his Lordship continued :]

* * * * * *

Therefore in deciding whether the stream between point *P* and point *R* vests in the Secretary of State we have these factors : (1) The extension of the "Kannikalamadugu" to the sea at Masulipatam was proposed in 1863 and by 1864 Rs. 2,000 had been spent on the project ; (2) the work was to start near the village of Lakkapalli ; (3) after the famine of 1876, further relief works were carried out in this district and lands were acquired from the zamindar for the purpose of continuing the "Kannikalamadugu" to the sea ; (4) the map of the Kistna district of the year 1877, which is confirmed by the map of the following year, shows that the "Kannikalamadugu" had been carried to the sea by the channel now in existence ; (5) there is confirmation of this in the proposals made in 1885 to construct another drain running into the Dayapukalva ; (6) the first plaintiff's father expressly recognised ownership of the whole stream in the Secretary of State and no right in the zamindar was advanced until the first plaintiff instituted this suit in 1927 ; (7) it is common ground that the arms of the "Kannikalamadugu" which are shown as flowing into the Puligadda in the map of 1828 have disappeared ; (8) there is no evidence to support the suggestion that the "Kannikalamadugu" forced its way east of point *P* naturally; and (9) it has not even been suggested that the zamindar did anything to improve the waterway, either as a drainage channel or a stream useful for irrigation purposes. In these circumstances it is, in our opinion, impossible for the second plaintiff to maintain the contention that he is the owner of the stream between points *P* and *R*. Consequently we hold that the stream is vested in the Secretary of State for India in Council from point *P* to the sea and that the second plaintiff has no rights in it from point *P* downwards. His rights in the lands adjoining the banks are, of course, not affected, but if he wants water from this part of the stream for the purpose of irrigating them, he must pay charges which are lawfully leviable under the Madras Irrigation Cess Act.

This brings us to the consideration of the question of the rights of the second plaintiff above point *P*. Undoubtedly he is the riparian owner from the point where the stream enters the zamindari in the north to point *P*, and unless the Madras Irrigation Cess Act applies he is entitled to withdraw water from the stream from this part for the irrigation of his lands lying to the north of point *P*, provided that he does not interfere thereby with the rights of others. Subject to the question of the application of the Madras Irrigation Cess Act his rights are those referred to by the Privy Council in *Secretary of State for India* v. *Subbarayudu*[1]. In that case, however, the stream was not connected with an anicut, while in the present case the stream is. The Secretary of State says that this makes all the difference and that the Government of Madras is entitled to levy water cess in respect of all water withdrawn by the plaintiff from the stream above point *P* for irrigation purposes. The learned

1. (1931) 62 M.L.J. 213 ; L.R. 59 I.A. 56 : I.L.R. 55 Mad. 268 (P.C.).

Advocate-General on behalf of the second plaintiff, admitted that the Government had the right of draining off water from the anicut along this stream.

The provisions of the Act which have bearing here are contained in section 1 down to the end of the first proviso. This part of the section reads as follows :—

" (*a*) Whenever water is supplied or used for purposes of irrigation from any river, stream, channel, tank or work belonging to, or constructed by or on behalf of, the Crown, and

(*b*) whenever water from any such river, stream, channel, tank or work, by direct flow or percolation, or by indirect flow, percolation or drainage from or through adjoining land irrigates any land under cultivation, or flows into a reservoir and thereafter, by direct flow or percolation, or by indirect flow, percolation or drainage from or through adjoining land, irrigates any land under cultivation, and in the opinion of the Revenue Officer empowered to charge water cess, subject to the control of the Collector and the Board of Revenue, such irrigation is beneficial to, and sufficient for the requirements of, the crop on such land.

It shall be lawful for the Provincial Government before the end of the revenue year succeeding that in which the irrigation takes place to levy at pleasure on the land so irrigated a separate cess for such water, and the Provincial Government may prescribe the rules under which, and the rates at which, such water cess shall be levied, and alter or amend the same from time to time :

Provided that where a zamindar or inamdar or any other description of land-holder not holding under ryotwari settlement is by virtue of engagements with the Crown entitled to irrigation free of separate charge, no cess under this Act shall be imposed for water supplied to the extent of this right and no more."

It will be observed that the Government is entitled to charge water cess whenever water from a work constructed by it by direct flow or percolation or indirect flow, percolation or drainage from or through adjoining land, irrigates land under cultivation, and in the opinion of the Revenue authorities the irrigation is beneficial to, and sufficient for the requirements of, the crop on the land, unless by virtue of an engagement entered into with the Crown a person is entitled to irrigation free of separate charge. In *Secretary of State for India* v. *Swami Naratheeswarar*[1], water which flowed from a Government source submerged certain dry lands. The inamdar was compelled to raise wet crops with the aid of the water which he enclosed in his adjoining land out of the flood water. It was held that he was liable to pay water cess. The fact that before irrigating the inamdar's lands the water had flowed through two-fifths of a sheet of water included in the inam did not make it anytheless water from a Government source. The fact that rain water had become mixed with flood water was no ground for getting rid of the liability. All that the Act required was that water from a Government source should irrigate the land in question, and in the opinion of the Collector the irrigation should be beneficial to, and sufficient for the requirements of the crop.

This case was followed in *Syed Hyder Ali Sahib* v. *Secretary of State for India*[2] and in *Ayyanna* v. *Secretary of State*[3]. The facts in the present case have much in common with the facts in *Syed Hyder Ali Sahib* v. *Secretary of State for India*[2]. In 1895, the Government of Madras completed an irrigation scheme known as the Periyar project. Before the construction of the Periyar main channel the lands there in suit were irrigated by a stream which emptied itself into a tank. As the result of the construction of the channel, Periyar water also flowed into the tank. It was held that the cultivator was liable to pay water cess. The Irrigation Cess Act empowered the Government to levy the cess whenever water flowing from a work constructed by Government was used for irrigation purposes. The Act was not concerned with the question whether the water had or had not become the property of the person using it.

We do not doubt the wisdom of these decisions, but even if we were inclined to question them they are binding on us and consequently we must hold that, subject to any special agreement, the Government is entitled to impose the cess in respect of water withdrawn by the second plaintiff from the stream above point *P*, notwithstanding that he owns the bed and both the banks. It has not been suggested that the water in the stream which flows from the anicut is insufficient for irrigation

1. (1910) 20 M.L.J. 766 : I.L.R. 34 Mad. 21.
2. (1933) M.W.N. 1457.
3. (1933) 65 M.L.J. 179 : I.L.R. 56 Mad. 696.

purposes. In fact, for a part of the year the whole of the water in the stream must come from the anicut.

The only question which remains is whether the second plaintiff is entitled to escape payment of water cess by reason of an engagement with the Government. The Subordinate Judge held that the second plaintiff was entitled to have water for the irrigation of 2,724·57 acres free of charge. In the course of the arguments it was conceded that the Subordinate Judge here made a mistake. The engagement which was entered into 1865 with regard to the 2,724·57 acres referred to water taken from another stream. Consequently, the declaration given by the Subordinate Judge must be cancelled. The second plaintiff, nevertheless, claims that he is entitled to a free supply of water to a limited extent from the stream above point *P*. The parties have agreed that this question shall not be decided in this suit, but settled on an application to Government to fix the area.

The result is that there will be a declaration that the second plaintiff has the rights of a riparian owner in the stream down to point *P*, subject to liability to pay water cess, but no right in the stream below point *P*, and the injunction granted will be discharged. The question of whether the second plaintiff is entitled by reason of an engagement with the Government to take free of charge some water for irrigation purposes from the stream above point *P* will be decided outside this suit. As the Secretary of State has succeeded, Appeal No. 33 of 1938 will be allowed with costs and Appeal No. 60 of 1938 will be dismissed with costs, in both cases against the second plaintiff. In the former appeal we fix the advocate's costs at Rs. 1,000 and in the latter appeal at Rs. 500.

K.S. ——— *Appeal No. 33 of 1938 allowed and Appeal No. 60 of 1938 dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

T. S. Sundararamier .. *Petitioner** (*Complainant-Respondent*)

v.

Chinnapalani Ambalam .. *Respondent* (*1st Accused*).

Criminal Procedure Code (V of 1898), section 422—Appeal against conviction—Notice issued to complainant but not to Crown—Conviction set aside—Revision petition filed by complainant—Interference.

The facts that notice is required under section 422 of the Code of Criminal Procedure to go to the Crown but no mention of notice to a private party is made indicate that the parties concerned in a criminal appeal from a conviction are the convicted person and the Crown. If in such a case the Crown supports the order of acquittal the Court is not concerned with the attitude taken by the complainant who instituted the proceeding, in the trial Magistrate's Court.

Where in an appeal against a conviction for an offence under section 323, Indian Penal Code, the Sub-Divisional Magistrate issued notice to the complainant and not to the Crown, and after hearing arguments the conviction was set aside and thereupon the complainant preferred a revision to the High Court,

Held, that the Sub-Divisional Magistrate erred in failing to comply with the mandatory provisions of section 422, requiring notice to the Crown, but that interference of the High Court was not called for in revision under the circumstances of the case.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the order of the Court of the Sub-Divisional Magistrate of Melur at Madura, dated 18th August, 1941 and made in C. A. No. 20 of 1941 (C. C. No. 136 of 1941 on the file of the Court of the Sub-Magistrate of Madura Taluk).

O. V. Baluswami for Petitioner.

S. K. Sundara Raman for Respondent.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—On a private complaint, the accused was convicted by the Stationary Sub-Magistrate of Madura Taluk under section 323, Indian Penal Code and sentenced

*Crl. R. C. No. 976 of 1941.
(Crl. R. P. No. 922 of 1941). 9th January, 1942.

to pay a fine of Rs. 25. In appeal to the Sub-Divisional Magistrate, Melur, notice went to the complainant, but not to the Crown as was required under section 422 of the Code of Criminal Procedure. Arguments were heard, the appeal was allowed and the conviction and sentence set aside. The complainant now approaches this Court in revision to set aside the order of the Sub-Divisional Magistrate on the ground that the complainant was not given a proper opportunity of appearing by counsel to argue the case for conviction.

There can be no doubt that the Sub-Divisional Magistrate did not comply with the mandatory provision of section 422 of the Code of Criminal Procedure which requires notice to the Crown. It was not necessary to give notice to the complainant especially as no compensation was awarded to him. The question, however, is whether in the circumstances of this case any interference by this Court is called for. Mr. Baluswami for the petitioner has shown me many cases in which this Court and the other High Courts have interfered in revision where this mandatory provision of the Code was not complied with; but in all these cases either the District Magistrate made a reference, or the Crown filed an appeal or revision petition, or the petition filed by the complainant was supported by the Crown. The facts that notice is required under section 422 to go to the Crown but no mention of notice to a private party is made indicate that the parties concerned in a criminal appeal from a conviction are the convicted person and the Crown. If, as in this case, the Crown supports, the order of acquittal, then we are not concerned with the attitude taken by the complainant who instituted the proceedings in the trial Magistrate's Court. Moreover, in the present case no important question is at issue. A petty offence was held by the Magistrate to have been committed that was punishable under section 323, Indian Penal Code; and a petty fine was imposed. The interests of justice certainly do not require that this Court should interfere in revision in this matter.

The petition is dismissed.

B.V.V. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Mooka Nadar and others .. *Appellants** (*Accused-Prisoners*).

Indian Penal Code (XLV of 1860), sections 147 and 324—Trespass on land during absence of owner—Owner bringing friends and resisting with force of arms the trespassers who were also armed—If guilty of forming an unlawful assembly and rioting.

A person does not lose possession of a field by going home to have a meal, or to sleep. If somebody enters on his land during his absence and he does not acquiesce in the trespass, he would still retain possession of the land and as the person in possession of the land he is entitled to defend that possession. If he brings friends with him and with force of arms resists those who are trespassing on the land who are also armed, he and his friends would not be guilty of forming themselves into an unlawful assembly; for those who defend their possession are not members of an unlawful assembly. If a person acquiesces in his dispossession and subsequently under claim of title comes again to dispossess his opponents, then he and his friends would be members of an unlawful assembly and guilty of rioting.

Appeal against the conviction and sentence passed by the Sessions Judge of the Court of Session of the Madura Division in C. C. No. 65 of 1941.

J. S. Athanasius for Appellants.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court delivered the following

JUDGMENT.—The five appellants were found by the Sessions Judge of Madura to have been members of an unlawful assembly who went to the field of the deceased person and took possession from him. The first three accused were convicted under section 148, Indian Penal Code, for rioting armed with deadly weapons and sentenced to three years' rigorous imprisonment. The other two appellants were found guilty under section 147, Indian Penal Code and sentenced to two years' rigorous imprisonment. The first accused was also found guilty under section 324,

*Criminal Appeal No. 630 of 1941. 8th January, 1942.

Indian Penal Code for the specific injury caused by him and sentenced to three years' rigorous imprisonment.

It cannot be denied that the party of the appellants and the party of his opponents met on the field, the possession of which is in dispute, and that they attacked one another and inflicted injuries on several persons present. The principal question in dispute is whether the deceased, who was in the party of the appellants, was in possession of the field on the day of dispute or P. W. 2. The evidence on that point is very meagre indeed. It seems to be true that the party of P. W. 2 were on the field first on the morning on which this offence happened ; but that does not necessarily mean that they were then in possession of the field. A person does not lose possession of a field by going home to have a meal, or to sleep. If somebody enters on his land during his absence and he does not acquiesce in the trespass, he would still retain possession of the land ; and as the possessor of the land, he is entitled to defend that possession. If he brings friends with him and with force of arms resists those who are trespassing on the land, who are also armed, he and his friends would not be guilty of forming themselves into an unlawful assembly ; for those who defend their possession are not members of an unlawful assembly. If a person acquiesces in his dispossession and subsequently under claim of title comes again to dispossess his opponents, then he and his friends would be members of an unlawful assembly and guilty of rioting.

The real question to be decided is whether the deceased was dispossessed by virtue of two agreements entered into by him and P. W. 2. * * *

[After discussing the question, His Lordship continued :]

With the prosecution case resting only on the evidence of P. W. 5 on the one hand, and there being the evidence of D. Ws. 1 and 2 on the other hand, the accused are entitled to the benefit of the doubt. On the charge under section 147, the burden is on the prosecution and they have not discharged it. Even with regard to the charge under section 324 where the burden is on the accused to show that they had a right of self-defence, I think, the accused might be said to have discharged the burden in view of the fact that D. Ws. 1 and 2 have deposed in their favour and it has not even been suggested in cross-examination that their statements were not true.

The appeal is therefore allowed and all the accused acquitted on both charges.

K.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE SHAHABUDDIN.

Manilal and others .. *Petitioners** (*Defendants*)

v.

M. P. Venkatachalapathi Iyer (deceased) and others .. *Respondents* (*Plaintiff and nil*).

Civil Procedure Code (V of 1908), section 21—Contract—Offer sent by post—Place of acceptance material—Suit for breach of contract—Whether can be filed at place of offer.

A contract is made at the place where the offer is accepted. And an offer when accepted by post is accepted at the place where the letter of acceptance is posted and therefore the cause of action arises there.

Where the plaintiff, a resident of Madura, made an offer to the defendants who were merchants residing at Bombay to purchase certain goods at a particular price and the defendants replied with a counter-offer to supply the goods at a different rate and thereupon the plaintiff made a fresh offer which was accepted by defendants and the suit was filed for breach of contract arising out of the failure of the defendants to send the goods promised,

Held, that no part of the cause of action arose at Madura and the suit was not entertainable by the Court at that place.

Mylappa Chettiar v. *Aga Mirza Mohamed Shirazee*, (1919) 37 M.L.J. 712; *The National Insurance Co., Ltd., Calcutta* v. *Seethammal*, (1933) 65 M.L.J. 455 ; *Bengal Insurance and Real Property Co., Ltd.* v. *Velayammal*, I.L.R. (1937) Mad. 990 : *Ahmed Bux* v. *Fasal Karim*, (1940) 1 M.L.J. 676 : I.L.R. (1940)

*C. R. P. No. 777 of 1942. 24th February, 1943.

Mad. 195 and *Pachayammal* v. *Hindustan Co-operative Insurance Co., Ltd., Madras,* (1940) 2 M.L.J. 688 : I.L.R. (1941) Mad. 109, relied on.

Venkatareddi v. *Nataraja Setti,* (1924) 46 M.L.J. 371 and *Sepulchre Bros.* v. *Kushala Das,* (1941) 2 M.L.J. 481 : I.L.R. (1942) Mad. 243, dissented from.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge of Madura dated 10th April, 1942, and made in O. S. No. 73 of 1941.

A. C. Sampath Aiyangar for Petitioners.

C. S. Venkatachariar and *T. K. Subramania Pillai* for Respondents.

The petition came on for hearing, in the first instance before Horwill, J., on 8th February, 1943, who made the following

ORDER.—By Ex. P-1, dated 7th September, 1940, the plaintiff, a resident of Madura, made an offer to the defendants, merchants residing in Bombay, to purchase 200 pounds of naphthalene at Rs. 12-8-0 a pound. By Ex. P-2, dated 9th September, 1940, the defendants replied with a counter offer to supply the goods at Rs. 13 a pound. By Ex. P-3, dated 13th September, 1940, the plaintiff made an offer to take 500 pounds at the rate quoted by the defendants. By Ex. P-5, dated 14th September, 1940, the defendants accepted the offer. There was some other correspondence with which we are not concerned. A preliminary point raised in the Court below was whether the Subordinate Judge of Madura had jurisdiction to entertain the plaintiff's suit for breach of contract arising out of the failure of the defendants to send the goods promised. The Subordinate Judge held that he had jurisdiction. This revision petition has been filed against that decision.

Many similar cases have come before this Court; and until Ramesam, J., questioned the correctness of them in *Venkata Reddi* v. *Nataraja Setty*[1], it was a well-recognised principle that where an offer is sent from a place *A* to a person in place *B* and accepted there, then the whole cause of action arises at *B* and no suit would lie at *A* ; because the offer is made only at the place *B* and the acceptance is completed as soon as the merchant at *B* posts his letter. Some of the Madras decisions under the present Code of Civil Procedure in which it has been held that the whole cause of action arose at *B*, are *Mylappa Chettiar* v. *Aga Mirza Mohamed Shirazee*[2]; *The National Insurance Co., Ltd., Calcutta* v. *Seethammal*[3]; *Bengal Insurance and Real Property Co., Ltd.* v. *Velayammal*[4]; and *Ahmed Bux* v. *Fazal Karim*[5], although the last mentioned decision only deals expressly with the question of the place of offer ; but it is implicit in that decision that the acceptance took place there also. In *Venkatareddi* v. *Nataraja Setti*[1], Ramesam, J. expressed an opinion that as the place of receipt of the offer is the place where the offer is made, so by an analogous reasoning the place where the acceptance is made would be where it is communicated or acknowledged. Ramesam, J., distinguished two English cases which seemed to come to a contrary conclusion, and he doubted the correctness of *Mylappa Chettiar* v. *Aga Mirza Mohamed Shirazee*[2] and *Kamisetti Subbiah* v. *Katha Venkataswami*[6], the latter decision being under the old Code. He however gave an alternative reason why in that case the cause of action arose in the place from which the offer was sent ; and so the opinion expressed with regard to the place of acceptance was an *obiter dictum.* Patanjali Sastri, J., in *Sepulchre Bros.* v. *Kushala Das*[7], considered the question more fully and felt that if there had been no other case in which it had been held that the acceptance spoke on the date of receipt of the letter of acceptance, he would feel himself unable to follow Ramesam, J. Patanjali Sastri, J., found support, however, in *Evans* v. *Nicholson*[8], an English decision of 1875, which followed older cases in which it was held that although the letter of acceptance speaks the moment it is posted, the act of acceptance is a continuous one and speaks also at the moment when it is received.

---

1. (1924) 46 M.L.J. 371.
2. (1919) 37 M.L.J. 712.
3. (1933) 65 M.L.J. 455.
4. I.L.R. (1937) Mad. 990.
5. (1940) 1 M.L.J. 676 : I.L.R. (1940) Mad. 195.
6. (1903) 27 Mad. 355.
7. (1941) 2 M.L.J. 481 : I.L.R. (1942) Mad. 243.
8. (1875) 32 L.T. (N.S.) 778.

I feel that as the Bench decisions quoted above have dealt with the very point that is raised in this case, I cannot give a decision contrary to that expressed in them. On the other hand, I feel that this matter deserves consideration by a Bench, because until Patanjali Sastri, J., gave his decision in *Sepulchre Bros.* v. *Kushala Das*[1], it was the established law in this presidency (and elsewhere in India also) that the suit should be laid only in the Court that has jurisdiction over the place *B*, where the acceptor receives and accepts the offer. Even if I agreed with Patanjali Sastri, J., I should feel that some greater authority was necessary for such an important change in law and practice.

Mr. Venkatachariar has contended that despite the fact that the contract was completed by the letter or telegram from Bombay to the plaintiff, yet in view of the fact that a formal document of contract described as a sale note (Ex. P-6) was drawn up and signed by the plaintiff, it must be considered that the contract was completed at Madura where the plaintiff signed it. As the contract had already been completed, it seems to me immaterial that for convenience the parties should subsequently embody the terms of the contract in a single document and sign it.

I therefore direct that the papers be placed before the Chief Justice for consideration whether this Civil Revision Petition should not be decided by a Bench.

[The petition came on for hearing, in pursuance of the aforesaid Order and the Court delivered the following]

JUDGMENT : *The Chief Justice.*—The petitioners ask the Court to revise, in the exercise of the powers conferred upon it by section 115, Civil Procedure Code, an order of the Subordinate Judge of Madura holding that the Court had jurisdiction to entertain a suit filed by the respondent.

The respondent is a merchant carrying on business in Madura. The petitioners are merchants carrying on business in Bombay. On the 7th September, 1940, the respondent wrote to the petitioners offering to purchase 200 pounds of naphthalene at the price of Rs. 12-8-0 per pound. On the 9th September, 1940, the petitioners replied making a counter offer. They were willing to supply the goods at the price of Rs. 13 a pound. By a letter dated 13th September, 1940, the respondent offered to buy 500 pounds of naphthalene at the rate quoted by the petitioners. This offer was accepted by the petitioners in a letter dated 14th September, 1940, and posted in Bombay.

The Subordinate Judge held that he had jurisdiction to entertain the suit as in his view part of the cause of action arose in Madura. He regarded the receipt of the letter in Madura from the petitioners as being part of the cause of action. This opinion is opposed to at least five Bench decisions of this Court, two of which were quoted to him. He rejected them because of the observations of Patanjali Sastri, J., in a recent case, *Sepulchre Bros.* v. *Kushala Das*[1]. The present petition came in the first instance before Horwill, J., who referred it to a Bench for decision.

A contract is made at the place where the offer is accepted. In accordance with English authorities this Court has held that an offer when accepted by post is accepted at the place where the letter of acceptance is posted and therefore the cause of action arises there. See *Mylappa Chettiar* v. *Aga Mirza Mohamed Shirazee*[2], *The National Insurance Co., Ltd., Calcutta* v. *Seethammal*[3], *Bengal Insurance and Real Property Co., Ltd.* v. *Velayammal*[4], *Ahmed Bux* v. *Fazal Karim*[5] and *Pachayammal* v. *Hindustan Co-operative Insurance Co., Ltd., Madras*[6]. All these cases were decided by Division Benches.

In *Venkatareddi* v. *Nataraja Setti*[7], Ramesam, J., sitting alone expressed the opinion that the receipt of acceptance when the contract is complete is part of the

---

1. (1941) 2 M.L.J. 481 : I.L.R. (1942) Mad. 243.
2. (1919) 37 M.L.J. 712.
3. (1933) 65 M.L.J. 455.
4. I.L.R. (1937) Mad. 990.
5. (1940) 1 M.L.J. 676 : I.L.R. (1940) Mad. 195.
6. (1940) 2 M.L.J. 688 : I.L.R. (1941) Mad. 109.
7. (1924) 46 M.L.J. 371.

cause of action because he considered that there was no reason why an acceptance should be in a worse position than an offer. The case did not call for a decision on this question, and the observations can only be regarded as *obiter*. In *Sepulchre Bros.* v. *Kushal Das*[1], Patanjali Sastri, J., accepted the dictum of Ramesam, J., notwithstanding that the decisions of this Court in the *National Insurance Co., Ltd., Calcutta* v. *Seethammal*[2] and *Ahmed Bux* v. *Fazal Karim*[3], were quoted to him and were binding on him. He brushed them aside on the ground that the learned Judges who had decided them had not considered this aspect and because in his opinion support for the dictum of Ramesam, J., was to be found in the English case of *Evans* v. *Nicholson*[4]. A Judge has, of course, always the right of expressing his own opinion and indicating that he is not in agreement with an authority binding on him, but he is nevertheless in duty bound to follow it, as the Full Bench of this Court which decided *Seshamma* v. *Narasimha Rao*[5], had occasion to point out. The fact that a Judge thinks that some argument has been overlooked in a judgment binding on him is no reason for refusing to follow it. The result of Patanjali Sastri, J., refusing to follow the cases of this Court which bound him has led the Subordinate Judge into the erroneous belief that his judgment represents the law as laid down by this Court. So far as this Court is concerned the law has been stated in the five Bench decisions to which we have referred. The judgments there are binding on us as they were binding on Patanjali Sastri, J., and we must follow them.

The petition will be allowed with costs. This means that the plaint will be returned to the plaintiff for presentation to the proper Court. The question of the costs before the Subordinate Judge will be decided by him.

B.V.V. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

Vasireddi Raja Lakshmamma and another .. *Appellants** (*Respondents*)

v.

Gopu Raghavayya and others .. *Respondents* (*Appellants*).

Provincial Insolvency Act (V of 1920), sections 4, 53, 54-A—Transfer of Property Act (IV of 1882), section 53—Deed of settlement by insolvent for marriage provision of his daughter—Settlement more than 2 years prior to presentation of insolvency application—Official Receiver declining to take action—Effect of unconditional discharge.

An insolvent had made a deed of settlement two years prior to the petition for adjudication, as provision for the marriages of his daughters. The Official Receiver was moved to have the transaction set aside by the Court. On his refusal to do so the respondent sought leave of Court under section 54-A to take action in respect of the deed. Leave was given but before the respondent took any action the insolvent was discharged unconditionally.

Held, that an application under section 54-A did not lie once the insolvent had been granted an unconditional discharge.

Desikachari v. *Official Receiver, Chingleput*, (1942) 2 M.L.J. 714, followed.

Held, further, that section 53 of the Act could not apply as the property was conveyed two years prior to the date of the insolvency petition, and no action had been taken under section 53 of the Transfer of Property Act.

Appeal against the order of the District Court of Kistna at Chilakalapudi, dated 28th August, 1941, and made in A. A. O. No. 74 of 1940, preferred against the order of the Court of the Subordinate Judge of Bezwada, dated 6th September, 1940, in C. M. P. No. 122 of 1937 in I. P. No. 4 of 1929.

P. Somasundaram for Appellants.

K. Kameswara Rao for Respondents.

---

1. (1941) 2 M.L.J. 481 : I.L.R. (1942) Mad. 243.
2. (1933) 65 M.L.J. 455.
3. (1940) 1 M.L.J. 676 : I.L.R. (1940) Mad. 195.
4. (1875) 32 L.T. (N.S.) 778.
5. (1940) 1 M.L.J. 400 : I.L.R. (1940) Mad. 454 at 474 (F.B.).

*A. A. A. O. No. 14 of 1942. 2nd February, 1943.

The Judgment of the Court was delivered by

The Chief Justice.—The question in this appeal is whether a creditor can take action under section 54-A of the Provincial Insolvency Act after the insolvent has been given an absolute discharge.

On the 3rd January, 1929, one Pretumbaka Venkatappayya and his four sons applied to be adjudicated insolvents and on the 9th January, 1930, an order of adjudication was passed. On the 24th July, 1934, the insolvents applied for their discharge and on the 28th September, 1936, it was granted unconditionally. On the 27th July, 1926, by a registered instrument, Venkatappayya settled 5.10 acres of land on his two daughters as provisions for their marriages. The elder daughter had already been married and the younger daughter was about to be married. The Official Receiver was moved by the respondent to take action with a view to obtaining from the Court an order setting this deed aside, but the Official Receiver refused to take action and intimated his refusal in an order dated the 13th December, 1932. On the 26th July, 1935, the respondent himself applied under section 54-A of the Provincial Insolvency Act for permission to take action in respect of the deed of settlement. The section says that a petition for the annulment of a transfer under section 53 or of a transfer, payment, obligation or judicial proceeding under section 54, may be made by the receiver or, with the leave of the Court, by a creditor who has proved his debt and who satisfies the Court that the receiver has been requested and has refused to move the Court. On the 11th August, 1936, the Court gave the first respondent leave to take action under section 53, but he did not in fact file the petition until the 19th January, 1937, that is until four months after the insolvents had been granted their discharge.

In his petition asking the Court to set aside the transaction the first respondent coupled section 4 with section 53. It is obvious why he did this. It was impossible for the Court to set aside the transaction under section 53 beccause the deed of settlement had been executed more than two years before the presentation by the insolvents of the petition asking for their adjudication. The object was to get the Court to hold under section 4 that the transaction was a sham and therefore did not require to be set aside ; in other words the deed was of no effect and the property automatically devolved upon the Official Receiver when the order of adjudication was passed. The Subordinate Judge dismissed the first respondent's petition on the ground that the transaction was genuine, but on appeal his order was reversed by the District Judge, who held that the transaction was fraudulent and consequently set it aside. This appeal is from the order of the District Judge.

We consider that the appeal is well founded. In the first place an application under section 54-A did not lie once the insolvents had been granted an unconditional discharge. The property referred to in the deed of settlement did not vest in the Official Receiver on the adjudication. The deed may have constituted a fraud on the creditors, but nevertheless it operated to convey a title to the daughters and until set aside the Official Receiver had no claim to the property. If the property had devolved on the Official Receiver, different considerations might have arisen but as it had not devolved upon him action under section 54-A was not open. Support for this opinion is to be found in the decision of this Court in *Desikachari* v. *Official Receiver, Chingleput*[1].

There is a further reason why the appeal should be allowed. The transaction not being void but merely voidable, it can only be set aside under the provisions of section 53 of the Provincial Insolvency Act or section 53 of the Transfer of Property Act. Section 53 of the Provincial Insolvency Act did not apply because the property was conveyed to the daughters more than two years before the date of the insolvency petition and it is stated that no action was taken under section 53 of the Transfer of Property Act. In these circumstances, it is not necessary for us to decide whether the transaction was *bona fide* or *mala fide*. If the transaction was in fact fraudulent,

1. (1942) 2 M.L.J. 714.

as the District Judge held it to be, the creditors have only themselves to blame. The only person to move in the matter was the first respondent and he did not file his petition under section 54-A until seven years after the date of adjudication.

The order of the Subordinate Judge will be restored with costs throughout in favour of the appellants.

K.C. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

T. R. Rajagopala Chettiar, Trustee of Chinna Ramanuja Kootam, situate in Big Street, Kumbakonam .. *Appellant** (*Plaintiff*)

v.

D. Anjaneya Sastri .. *Respondent* (*1st Defendant*).

Adverse possession—Dedication of house to charity—Trustee in possession claiming as joint family property of himself and son—Possession adversely to trust for over twelve years—Effect—Charity's title extinguished to the extent of one half.

A house dedicated to a public charity and in the possession of the trustee was subsequently treated by him as belonging to the joint family consisting of himself and his son. They created mortgages over it as the owners thereof and were in joint possession for over twelve years adversely to the trust. A person who held a decree against them attached the property and bought it in the execution sale. In a suit by a succeeding trustee appointed under a scheme for the management of the trust, for recovery of the property as trust property,

Held, that since the son as a member of the joint family had been in joint possession of the house with his father for more than twelve years adversely to the trust, he had thereby acquired title to the extent of a half share of the house.

Iswari Bhubaneswari Thakurani v. *Brojo Nath Dey*, (1937) 2 M.L.J. 527 : L.R. 64 I.A. 203 : I.L.R. (1937) 2 Cal. 447 (P.C.), relied on.

Decision of Patanjali Sastri, J., in *Anjaneya Sastri* v. *Rajagopala Chettiar*, (1942) 2 M.L.J. 187, affirmed.

Appeal under clause 15 of the Letters Patent against the judgment and decree of Patanjali Sastri, J. [reported in (1942) 2 M.L.J. 187] dated 13th March, 1942, and passed in S. A. No. 856 of 1939, preferred to the High Court against the decree of the District Court of West Tanjore at Tanjore in A. S. No. 208 of 1936 preferred against the decree of the Court of the Subordinate Judge of Kumbakonam, in O. S. No. 49 of 1933.

K. V. Sesha Aiyangar for Appellant.

T. V. Muthukrishna Aiyar, *K. R. Krishnaswami Aiyar* and *S. Panchapagesa Sastri* for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—The appellant is the trustee of a public charity known as the Chinna Ramanuja Kootam Chathram and sued to recover possession of a house which had been dedicated to the trust. The defence was that the trust had lost title to it by reason of adverse possession and in second appeal this plea was accepted.

In 1897 one Malayaperumalswami Chettiar became the trustee and until 1903 performed the duties of his office. From then onwards Malayaperumalswami, who was joint with his four sons, treated the property as belonging to the family. On the 14th March, 1917, he and three of his sons, the fourth being dead, mortgaged the property as the owners thereof. Subsequently two of the sons purported to surrender their interests in the property to their father and their brother Sitharama. On the 22nd December, 1920, Malayaperumalswami and Sitharama raised a further loan on the security of the property. On the 9th March, 1928, the property was attached by the first defendant, who had obtained a decree against Malayaperumalswami and Sitharama and it was sold to the decree-holder in the sale which followed.

*L. P. A. No. 37 of 1942. 15th February, 1943.

On the 30th July, 1931, in O. S. No. 2 of 1930 of the Court of Small Causes, Kumbakonam, a scheme was framed for the management of the trust and the plaintiff was appointed the trustee. On the 4th January, 1933, he filed in the Court of the Subordinate Judge of Kumbakonam the present suit to recover the property; the first defendant alleged that Malayaperumalswami had been in possession adversely to the trust from 1903 onwards and as the suit had been brought more than twelve years from the commencement of the adverse possession it was out of time. The Subordinate Judge rejected the plea of adverse possession and decreed the suit. On appeal his decision was upheld by the District Judge of West Tanjore. The first defendant then appealed to this Court from the decree of the District Court in so far as it concerned the half share claimed by Sitharama. The appeal was heard by Patanjali Sastri, J., who held that inasmuch as Sitharama had been in possession of a half share interest in the property for more than twelve years he had obtained a title to that extent. The learned Judge here relied on the decision of the Privy Council in *Iswari Bhubaneswari Thakurani* v. *Brojo Nath Dey*[1]. This appeal is from the judgment of Patanjali Sastri, J., under clause 15 of the Letters Patent.

In *Iswari Bhubaneswari Thakurani* v. *Brojo Nath Dey*[1], two brothers *R* and *B*, who constituted a joint family governed by the Dayabagha law, by a deed executed in 1888, dedicated certain immovable properties to a domestic deity and conveyed the properties to themselves as *shebaits.* The deed provided that the right of *shebaiti* should go to their male heirs by primogeniture. In 1896, *R* and *B* conveyed additional properties to themselves as *shebaits.* In 1901 *R* died, leaving two sons *P* and *S*. At the time of his father's death *S* was a minor. In 1904 in a suit instituted by *S* suing through his mother as his next friend, a preliminary decree was passed by consent of the parties setting aside the deeds of 1888 and 1896. The defendants were *B*, *P* and their sons. The decree provided that a moiety of the property should go to *B* and the other moiety to *P* and *S*. A final decree was passed in 1906 and in the partition of the properties, the *thakurbarhi* and a house built for the *shebaits* were allotted to *P* and *S*. In 1918, *S* who was then a major brought a suit for the administration of his father's estate and for a division between him and his brother *P*. This resulted in a preliminary decree for the partition of the estate in equal shares between *P* and *S*, subject to an allowance for the maintenance of the deity. In 1924, *P* died, leaving two sons, *M* and *J*. In 1928, *M* as the *shebait* instituted the suit which gave rise to the appeal to the Privy Council for a declaration that the deity was entitled to the properties conveyed to *R* and *B* as *shebaits* by the deeds of 1888 and 1896. The Judicial Committee held that the *thakurbarhi* and the house built for the *shebaits* had been dedicated to the deity, but that *S* had acquired title to a half of these properties by adverse possession. From 1904 onwards for at least 12 years *S* had openly and without any fraudulent collusion been in joint possession of the *thakurbarhi* and the house on the basis that the consent order of 1904 was effective and that the property was not subject to dedication. As *S* was not affected by any fiduciary disability attaching to *P* there was nothing to prevent his possession of his half being adverse to the appellant idol.

Mr. Sesha Aiyangar on behalf of the appellant has contended that this decision has no application here because in that case the family was governed by the Dayabhaga law, whereas here the family is governed by the Mitakshara law. Being governed by the Dayabhaga law *P* and *S* acquired equal shares in the properties on the death of their father *R*. Under the Mitakshara law, while the family remains joint, there is community of interest and unity of possession. There is unity of possession under the Dayabghaa law but not community of interest and this, it is said, makes all the difference.

In agreement with Patanjali Sastri, J., we fail to see any real reason for drawing a distinction. A member of a joint family governed by the Mitakshara law has the right of alienating his interest in the family estate. It is true that the alienee cannot be put into possession until there is a partition, but he has the right of forcing

1. (1937) 2 M.L.J. 527 : L.R. 64 I.A. 203 : I.L.R. (1937) 2 Cal. 447 (P.C.).

a partition. The interest of a member of a joint family governed by the Mitakshara law is referred to in the authorities as his share. (See *Ramachandram Pillai* v. *Kalimuthu Chettiar*[1] and *Dharmarao* v. *Bapanayya*[2].)

As we have already pointed out, as long ago as 1903, Malayaperumalswami treated the property in suit as the property of the family and his sons accepted it as such. The fact that Sitharama joined in the mortgages of the 14th March, 1917, and the 22nd December, 1920, shows that he openly claimed an interest in the house. It had belonged to his grandfather Vasudeva, who died in 1875. Vasudeva was survived by his widow Abhayambal, who adopted Malayaperumalswami after her husband's death. The adoption was made on the condition that a half of the estate of Vasudeva should go to Malayaperumalswami and the other half to the widow for life and then to the Chinna Ramanuja Kootam Chathram. In 1887, Malayaperumalswami brought a suit against his adoptive mother for the recovery of the whole of the estate and this was compromised. The arrangement then made was that the properties should go to Malayaperumalswami except the house now in suit which was to be dedicated to the charity. Subsequently he repudiated that arrangement and he and his sons treated the house as belonging to the joint family. Sitharama was in joint possession of it with his father for more than 12 years and as his claim was adverse to the trust we consider that he acquired an interest to the extent of one half.

The appeal will be dismissed with costs.

K.C. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Original Matrimonial Jurisdiction].

PRESENT :—MR. JUSTICE BELL.

In the matter of The Indian Divorce Act, 1869.

Botawala de Rander .. *Applicant** (*Co-respondent*)

v.

J. P. Mitter .. *Respondent* (*Petitioner*).

Indian Divorce Act (IV of 1869), section 7—Order for security for costs—When can be passed—English practice—Applicability in India.

With regard to the practice as to ordering security for costs under section 7 of the Indian Divorce Act, the Courts in India act and give relief on principles and rules which as nearly as may be conformed to the principles and rules observed in England under the Matrimonial Causes Act and Rules. The discretion given to the Indian Courts is completely unfettered and the Courts should endeavour to exercise their discretion cautiously and carefully not only with regard to the parties themselves but to the interests of society and public morality in general. The Court will be justified in passing an order for security for costs where there is a claim for damages, and the petitioner is out of the jurisdictions of the Court and has no property within its jurisdiction.

Redfern v. *Redfern*, (1890) 63 L.T. 780 and *Agnes Ammal* v. *Paul*, (1935) 70 M.L.J. 321 : I.L.R. 59 Mad. 509 (F.B.), referred to.

K. Narasimha Aiyar for *T. V. Subramania Aiyar* for Applicant.

S. Govind Swaminathan for Respondent.

The Court delivered the following

JUDGMENT.—This is an application for an order that the petitioner in this divorce case should give security for the costs of the co-respondent. The circumstances in which the jurisdiction of this Court is sought are unusual. The petitioner apparently is a practising Barrister in Calcutta where he has practised for the last 14 years or thereabouts. For 3½ years he practised in Meerut. The marriage took place in Calcutta and the adultery is alleged to have taken place in Bombay. The allegations of adultery in the petition are of the vaguest description and in the form in which they stand at the moment, would not enable the petition to go very far. With regard to the practice as to ordering security for costs under section 7 of the Indian Divorce Act, the Courts in India act and give relief on principles and

---

1. (1911) 21 M.L.J. 246 : I.L.R. 35 Mad. 47.
2. (1941) 1 M.L.J. 15.

*Application No. 2006 of 1942 in O. M. S. No. 10 of 1941. 5th February, 1943.

rules which as nearly as may be conform to the principles and rules observed in England under the Matrimonial Causes Act and Rules. It has been said that this section has been enacted so as to give the Courts in India the fullest power to do justice. The discretion given to the Indian Courts is completely unfettered, and the Courts should endeavour to exercise their discretion cautiously and carefully not only with regard to the parties themselves but to the interests of society and public morality in general. It was decided in Madras in *Agnes Ammal* v. *Paul*[1] that the whole object of section 7 is to keep the practice of the Indian Courts in line with the English Courts but subject to the provisions of the Indian Divorce Act. In England, there is no settled practice, and it is always a matter of discretion as to whether security for costs is to be ordered, but so far as any guidance has been given, it will be found in *Redfern* v. *Redfern*[2], where it is said that security may be ordered (1) where there is a claim for damages and (2) where the petitioner is out of the jurisdiction. The reasons for this would seem to be that where there is a claim for damages, the co-respondent may feel compelled to fight the petition merely on the ground of quantum, *i.e.*, in a case where although the petitioner may be entitled to a divorce, by reason of his conduct or other circumstances he is not entitled to the damages that he claims; secondly, where the petitioner is outside the jurisdiction of the Court, the co-respondent if he is successful, may find it difficult, if not impossible, to enforce an order made in his favour for costs. The petitioner here has made a claim for damages and he is outside the jurisdiction of this Court. Section 45 of the Indian Divorce Act provides that all proceedings under this Act between party and party shall be regulated by the Code of Civil Procedure. It is urged on behalf of the petitioner therefore that Order 25, rule 1 applies. That is the order which deals with security for costs and when it may be required from a plaintiff, and says that where it appears the plaintiff resides out of British India and that such plaintiff does not possess sufficient immovable properties within British India, then security may be ordered, and it is contended that if that order and rule apply, this petitioner being within British India security cannot be ordered against him. I think, however, section 45 merely provides for matters of procedure, and does not apply to a case like this where in any event the Court must exercise its discretion. The test, I think, which I must apply is, has the petitioner assets in this country against which execution can be levied? He certainly has none within the jurisdiction of this Court. He says himself that in Calcutta he has a motor car worth Rs. 7,000. He does not state the age of the car or its condition. He says also that he has a law library worth many thousands of rupees. The latter was valued in his recent insolvency from which he obtained his discharge in 1940 at Rs. 300 only. He says that he has a share in family property worth many lakhs of rupees. But it is clear, and he admits it, that he has no immovable property against which this co-respondent, if successful, could proceed. In all the circumstances, I think this is a case where security should be given. I ought to say that I am not uninfluenced by the fact that he has deliberately sought the jurisdiction of this Court, knowing that all the evidence will have to come from Bombay or Calcutta and thereby deliberately increasing the costs of the parties involved.

On the facts, this is a case where security should be given, and I order the petitioner to find security. It is not necessary to cover the whole of the problematical costs of the co-respondent, if successful, and it will be enough for present purposes if I order him to find a sum of Rs. 1,000 within three weeks. The costs of this application will be costs in the cause.

B.V.V. —— *Petition ordered.*

---

1. (1935) 70 M.L.J. 321 : I.L.R. 59 Mad. 509 (F.B.).
2. (1890) 63 L.T. 780.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE SHAHABUDDIN.

K. Vengannan Chettiar and Sons, through Managing Partner K. V. Muthukrishna Chettiar .. *Appellant**

v.

N. Ramaswami Pillai .. *Respondent.*

Limitation Act (IX of 1908), section 14—Scope—Sub-mortgagee of 3 separate mortgages filing suit in Munsiff's Court claiming relief by sale of the properties—Return of plaint for presentation to Sub-Judge as value of the three mortgages exceeded pecuniary jurisdiction of Munsiff—Amendment of plaint abandoning relief by sale of properties under two of the mortgages and asking only for sale of mortgage right in them and re-presentation to Munsiff—Twelve years from the date of the other mortgage elapsing before re-presentation—Section 14 of the Limitation Act—Applicability.

On the 20th April, 1933, the plaintiff lent to the first and second defendants a sum of Rs. 2,000 on the security of a sub-mortgage of three separate mortgages executed in favour of the second defendant by the third, fourth and fifth defendants for Rs. 3,500, Rs. 750 and Rs. 1,000 on the 22nd July, 1927, the 5th January, 1923 and the 30th June, 1925, respectively. On the 29th June, 1937, the plaintiff instituted in the Court of the District Munsiff a suit to recover the amount due to him in respect of the sub-mortgage asking for the sale of the mortgaged properties. On the 6th June, 1938, the plaint was returned for re-presentation to the Subordinate Judge (as the valuation based on the amount due on the original mortgages on which alone court-fee will have to be paid exceeded the jurisdiction of the Munsiff). The plaintiff in the circumstances abandoned his claim for the sale of the properties mortgaged by the third and fourth defendants and was content to ask for the sale of the properties mortgaged by the fifth defendant and for the sale of the " mortgage right " of the second defendant in the other two properties thereby making the suit valuation sufficiently low to allow it to be instituted in the Munsiff's Court. He amended the plaint on the day on which it was returned and re-presented it to the District Munsiff. By that date more than twelve years had elapsed from the date of the mortgage created by the fifth defendant who then pleaded that the suit so far as he was concerned was barred by limitation.

Held, that as the plaintiff had acted in good faith in instituting the suit originally in the District Munsiff's Court and as his case throughout had been based upon the same cause of action, namely, his sub-mortgage, the fact that a different relief was asked for as against the first and second defendants in the amended plaint does not preclude the operation of section 14 of the Limitation Act in his favour. Accordingly the suit as against the fifth defendant is not barred by limitation.

Appeal under clause 15 of the Letters Patent against the decree and judgment of Chandrasekhara Aiyar, J., dated 11th November, 1942, and made in S. A. No. 559 of 1941, preferred against the decree of the Subordinate Judge of Dindigul in A. S. No. 89 of 1939 (O.S. No. 130 of 1938, District Munsiff's Court, Dindigul).

K. V. Sesha Aiyangar for Appellant.

M. S. Vaidyanatha Aiyar for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—The only question in this appeal is one of limitation. On the 20th April, 1933, the plaintiff lent to the first and second defendants a sum of Rs. 2,000 on the security of a sub-mortgage of three separate mortgages, executed by the third, fourth and fifth defendants respectively in favour of the second defendant. The first of these mortgages was executed by the third defendant on the 22nd July, 1927, to secure a sum of Rs. 3,500, the second on the 5th January, 1923, by the fourth defendant to secure Rs. 750 and the third on the 30th June, 1925, by the fifth defendant to secure Rs. 1,000. On the 29th June, 1937, the plaintiff instituted in the Court of the District Munsiff of Dindigul a suit to recover the amount due to him by the first and second defendants in respect of the sub-mortgage. As he had the right to do, he asked for the sale of the mortgaged property. On the 6th June, 1938, the plaint was returned to him for presentation to the Subordinate Judge. In *Vellavan Chettiar* v. *Mahalinga Pathan*[1], this Court had held that when a sub-mortgagee sues for the sale of the properties mortgaged to his mortgagor he must pay a court-fee based on the amount due on the original mortgage and not merely on the amount due in respect of his sub-mortgage.

---

*L. P. A. No. 66 of 1942. 23rd February, 1943.

1. (1938) 1 M.L.J. 171.

In these circumstances the plaintiff decided to abandon his claim for the sale of the properties mortgaged by the third and fourth defendants. He was content to ask for the sale of the property mortgaged by the fifth defendant and for the sale of the "mortgage right" of the second defendant so far as it concerned the other two properties. By abandoning the claim for the sale of the properties mortgaged by the third and fourth defendants the valuation of the suit became sufficiently low to allow the suit to be instituted in the District Munsiff's Court. Having amended the plaint the plaintiff on the day on which it was returned to him re-presented it to the District Munsiff. By the 6th June, 1938, more than twelve years had elapsed from the date of the mortgage created by the fifth defendant, who then pleaded that the suit so far as he was concerned was barred by the law of limitation. This plea was accepted by the District Munsiff who dismissed the suit so far as the fifth defendant was concerned, but granted a decree against the first and second defendants for the amount due under the sub-mortgage. In the event of the decretal amount not being paid he directed that the sub-mortgage should be sold. The plaintiff appealed to the Subordinate Judge, who held that the suit was not barred against the fifth defendant. Thereupon the fifth defendant appealed to this Court. His appeal was heard by Chandrasekhara Aiyar, J., who agreed with the District Munsiff and accordingly allowed the appeal. The learned Judge having given the necessary certificate, this appeal has been filed from his judgment under the provisions of clause 15 of the Letters Patent.

It was found by the Subordinate Judge that in instituting his suit originally in the District Munsiff's Court, the plaintiff acted in good faith and therefore he was entitled to the benefit of section 14 of the Limitation Act. Chandrasekhara Aiyar, J., agreed that the plaintiff had acted in good faith but he considered that by the amendment made in the plaint the plaintiff had changed his cause of action. The plaintiff says that there was no change in the cause of action, but only a change in the reliefs asked for and that this has not been appreciated by the learned Judge. We consider that the contention is well founded.

The plaintiff, both in the plaint as it originally stood and in the plaint as amended, was suing on his sub-mortgage. The right to relief arose from the fact that he was the sub-mortgagee and the failure of the sub-mortgagor to pay his debt was his cause of action. A sub-mortgagee has two courses open to him. He can, if he wishes, limit his suit to the sub-mortgagor, in which case he can only ask for the sale of the sub-mortgagor's interest in default of payment of the decretal amount. On the other hand, he may join the original mortgagor, and ask for a decree for the sale of the mortgaged property in default of payment. In this case the relief to which he is entitled is to be gathered from Form No. XI in Appendix D to the Civil Procedure Code. In that form the original mortgagor is described as defendant No. 1 and the original mortgagee as defendant No. 2. The form provides for a declaration of the amount due to defendant No. 2 on his mortgage and then directs that defendant No. 1 shall pay into Court the amount due to defendant No. 2 and that on payment into Court of the money the plaintiff shall be at liberty to apply for payment out. In default of payment, the plaintiff may apply to the Court for a final decree for sale. The form also provides that if defendant No. 2 pays into Court to the credit of the suit the amount adjudged due to the plaintiff, but defendant No. 1 makes default in the payment of the amount due to defendant No. 2, the latter shall himself be at liberty to apply to the Court for a final decree for sale.

In this case the plaintiff adopted the second course. He asked for a decree directing the defendants to pay the amount due on the second mortgage and in default for a decree for sale of all the properties covered by the sub-mortgage. In dropping the relief asked for against the third and fourth defendants the plaintiff was not altering his cause of action. His cause of action was still based on his sub-mortgage. So far as those defendants were concerned he was merely abandoning the reliefs to which he was entitled if he had chosen to file the suit in the Subordinate Judge's Court. What has weighed with the learned Judge—and great stress has been laid on this before us—is that the plaintiff in his amended plaint asked for

the sale of the mortgage right of the first and second defendants in the two other properties. This was, however, a relief which was open to him in the plaint as originally drafted and in asking for it he was not setting up a new cause of action. The cause of action still remained his sub-mortgage.

The learned counsel for the fifth defendant has drawn our attention to the decision of the Calcutta High Court in *Krishna Kishore De* v. *Amarnath Kshetry*[1] and the decision of this Court in *Mohideen Pichai Sahib* v. *Nagoore Meera Rowther*[2]. In the first of these cases a person owning property in the mofussil mortgaged it, the mortgagee sub-mortgaged it, but by the same deed he gave the sub-mortgagee further security, properties owned by him in Calcutta. The sub-mortgagee instituted a suit on the Original Side of the Calcutta High Court, and it was held that he could not be allowed by the inclusion of two claims in one suit against his mortgagor and against the original mortgagor in respect of properties situated as regards one of them in the mofussil to make the composed suit against both the defendants maintainable on the Original Side of the Court. This case has been quoted because Mookerjee, J., in the course of his judgment said that the causes of action under the original mortgage and under the sub-mortgage were distinct and affected different sets of individuals of whom one set held properties situated entirely in the mofussil. This may be accepted, but it does not mean that the plaintiff in this case has by the amendments in the plaint changed his cause of action. He is still suing on his sub-mortgage. In *Mohideen Pichai Sahib* v. *Nagoore Meera Rowther*[2], it was also pointed out that the mortgagee's cause of action and that of the sub-mortgagee are separate; but there is nothing in this judgment which can be read as rendering support for the argument that the plaintiff in the present case sued on a different cause of action when he amended his plaint. Throughout his case has been based upon his sub-mortgage and the fact that a different relief was asked for as against the first and second defendants in the amended plaint does not preclude the operation of section 14 of the Limitation Act. That section says nothing about relief. It merely provides that the subsequent suit shall be founded upon the same cause of action and prosecuted in good faith. Here the cause of action was the same and clearly there was good faith.

For these reasons the appeal will be allowed and the decree of the Subordinate Judge restored with costs throughout.

K.S. ——— *Appeal allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE LAKSHMANA RAO AND MR. JUSTICE KRISHNASWAMI AYYANGAR.

Seelam Nagamma and another .. *Appellants** (*Defts. 1 & 2-Applts.*)

v.

Reddem Lingareddi *alias* Ramalingareddi lately a minor by guardian and father China Kondareddi and another .. *Respondents* (*Plffs. 4 & 5-Respts.*).

Hindu Law—Succession—Bandhus—Tests of heritability—Dr. Sarvadhikari's line theory rejected—Sister's son's daughter's son excludes maternal uncle's son's son.

The sister's son's daughter's son of the last male owner is a heritable bandhu and will exclude the maternal uncle's son's son of the deceased.

The decisions have now finally settled that in order that a person may inherit as a bandhu he must satisfy two tests : (1) the test of degree, *i.e.*, where the claimant traces his relationship to the propositus through the latter's mother, he (the claimant) must be within five degrees of descent from the common ancestor, who must also be within five degrees of ascent from the propositus himself; but if he traces his relationship through the father of the propositus, the degrees are to be taken as seven instead of five; (2) the test of mutuality, *i.e.*, the claimant and the propositus must be

1. (1920) I.L.R. 47 Cal. 770.
2. (1937) 2 M.L.J. 536 at 537.

*S. A. No. 75 of 1940. 10th February, 1943.

related to each other in such a way that each is a sapinda of the other, that is, within the degrees limited by the first test.

The " line theory " of Dr. Sarvadhikari is not sound and is not supported by any ancient text or recognised commentary.

There is no basis for the proposition that in going upwards from the propositus or the claimant neither the fourth nor any higher link can be a female or that there can only be a male ancestor above the grandparents on both sides.

Kesar Singh v. *Secretary of State for India*, (1926) 51 M.L.J. 16 : I.L.R. 49 Mad. 652, approved ; *Chinna Pichu Ayyangar* v. *Padmanabha Ayyangar*, (1920) 39 M.L.J. 417 : I.L.R. 44 Mad. 121, disapproved and *Gajadhar Prasad* v. *Gouri Shankar*, (1932) I.L.R. 54 All. 688 at 699 (F.B.), dissented from.

Appeal against the decree of the Court of the Subordinate Judge of Kurnool in A. S. No. 17 of 1938 (A. S. No. 97 of 1938, District Court, Kurnool) preferred against the decree of the Court of the District Munsiff of Nandyal in O. S. No. 282 of 1936.

Ch. Raghava Rao for Appellants.

S. Panchapagesa Sastri, Kasturi Seshagiri Rao, M. Srinivasa Rao and *Kasturi Sivaprasada Rao* for Respondents.

[This appeal coming on for hearing, the Court (*King, J.*) made the following]

ORDER OF REFERENCE TO A FULL BENCH.*

The first and principal point raised in this appeal is whether plaintiff 5 is or is not a heritable *bandhu* of the deceased Macha Chenchi Reddi. I have been assured by the advocates on both sides that there are two Bench decisions in Madras, the principles of which would directly decide this issue—though decide it in direct conflict with each other. These are *Chinna Pichu Aiyangar* v. *Padmanabha Aiyangar*[1] and *Kesar Singh* v. *Secretary of State for India*[2]. It seems to me in these circumstances that this conflict of judicial opinion should be resolved by a Full Bench, and I accordingly submit the records to the Honourable the Chief Justice for posting the appeal before a Full Bench if he thinks fit.

[This appeal coming on for hearing, in pursuance of the aforesaid Order of Reference, the Judgment of the Court was delivered by]

Krishnaswami Ayyangar, J.—A question of importance relating to *bandhu* succession under the Mitakshara system of inheritance has been the subject of two conflicting decisions in this Court and it is for the purpose of resolving the conflict that this second appeal has been placed before the Full Bench. The conflicting decisions are those to be found in *Chinna Pichu Aiyangar* v. *Padmanabha Aiyangar*[1] and *Kesar Singh* v. *Secretary of State for India*[2].

The last male owner of the estate involved in this second appeal was one M. Chenchi Reddi, who died long ago leaving a widow Chennamma. She took the estate as his heir, and died on 24th October, 1935. On her death, the estate devolved on the nearest reversioner. Who among the several claimants is the nearest, is the question which the Court has to determine. The competition was between three sets of claimants. Plaintiffs 1 to 3 claimed to be M. Chenchi Reddi's father's father's father's daughter's son's son's sons, that is to say, the father's paternal aunt's son's grandsons. The second defendant claims to be M. Chenchi Reddi's mother's father's son's son's son, that is, the maternal uncle's grandson. The fifth plaintiff is M. Chenchi Reddi's father's daughter's son's daughter's son, that is, the sister's son's daughter's son. While the relationship of the fifth plaintiff stands admitted, the relationship of plaintiffs 1 to 3, and that of the second defendant was only assumed for the purpose of the decision. Both the Courts below have concurred in holding that even if the relationship set up by them is true, they are remoter reversioners than the fifth plaintiff and must accordingly be postponed to him.

There are two appellants in this second appeal. The first appellant was the first defendant, but she admittedly has no manner of right to the estate. The second appellant was the second defendant in the suit. Of the two respondents, the first was the fourth plaintiff in the suit. She is the mother of the fifth plaintiff; but being a female, she can come in only after all the male *bandhus* of the propositus are

---

* 17th December, 1942.

1. (1920) 39 M.L.J. 417 : I.L.R. 44 Mad. 121. 2. (1926) 51 M.L.J. 16 : I.L.R. 49 Mad. 652.

exhausted. The second respondent is the fifth plaintiff. His admitted relationship to M. Chenchi Reddi is that indicated in table I, while that of the second defendant will appear from table II hereunder. The common ancestor is indicated by the letters CA in the duplicate table, while the propositus and the claimant are indicated by the letters P and C respectively. In the intermediate links D represents a female and S a male. The contest now, as indeed it was in the Courts below, is between the fifth plaintiff and the second defendant. Plaintiffs 1 to 3 were eliminated in the Courts below as they are the *pitru bandhus* of the last owner, whereas the fifth plaintiff and the second defendant are both his *atma bandhus*.

TABLE I.

M. Nagireddi

- Macha Chenchi Reddi (Propositus).
- Nagamma
  - V. Nagireddi
    - Chenchamma (4th plaintiff)
      - R. Linga Reddi (5th plaintiff)

DUPLICATE.

CA

- P
- D — S — D — C

TABLE II.

K. Narasimha Reddi

- Thimmakka
  - Macha Chenchi Reddi (Propositus)
- K. Nagireddi
  - K. Chenchireddi
    - K. Nagireddi (2nd defendant)

DUPLICATE.

CA

- D — P
- S — S — C

Before us it was conceded—and rightly so—that if the fifth plaintiff is a heritable *bandhu*, he would be the preferential heir as he belongs to a nearer line than the second defendant. The question then is whether the fifth plaintiff is a heritable *bandhu* at all. If he is, he would, it is admitted, exclude the second defendant.

The law of *bandhu* succession under the Mitakshara has always been a thorny subject, mainly on account of the incomplete and fragmentary way in which Vijnaneswara had dealt with it. Much of the doubts and difficulties have, however, been cleared up by the decisions of the Privy Council, more particularly those reported as *Ramachandra Martand Waiker* v. *Vinayak Venkatesh Kothekar*[1] and *Adit Narayan Singh* v. *Mahabir Prasad Tiwari*[2]. These decisions have now finally settled that in order that a person may inherit as a *bandhu*, that is, as a *bhinna gotra sapinda* he must satisfy two tests. The first is the test of degree laid down by Yajnavalkya in Chapter I, 53 which may be literally rendered as follows :

> "After the fifth (ancestor) from the mother, and after the seventh (ancestor) from the father."

By this statement is meant that where the claimant traces his relationship to the propositus through the latter's mother, he (the claimant) must be within five degrees of descent from the common ancestor, who must also be within five degrees of ascent from the propositus himself. But if he traces his relationship through the father of the propositus, the degrees are to be taken as seven instead of five. Relations beyond the degrees specified are not recognised as *sapindas* at all and are accordingly not heirs. Perhaps there may be room still left for a controversy as to whether the degrees are to be taken as five in all cases of *bandhu* succession irrespective of the relationship being traced through the mother or the father. (Mayne's Hindu Law,

---

1. (1914) 27 M.L.J. 333 : L.R. 41 I.A. 290: I.L.R. 42 Cal. 384 (P.C.).

2. (1920) 40 M.L.J. 270 : L.R. 48 I.A. 86 (P.C.).

10th edn., § 113, *et seq.*) But it is not necessary for us to go into this question, as both claimants in the present appeal are within the lower limit of five degrees.

The second test which has also been recognised by the Privy Council is the test of mutuality. By this is meant that the claimant and the propositus must be related to each other in such a way that each is a *sapinda* of the other, that is, within the degrees limited by the first test. This qualification is not mentioned in the Mitakshara, but it has been derived from a text of Manu, whose authority is supreme. These two tests have been so fully explained in the decided cases and in the text books that it is needless to devote further space to elucidate either of them here. The only question which we have to decide is whether there is in addition, a third test which a claimant must satisfy before he can be recognised as a heritable *bandhu.* On the answer to this question depends the decision of the appeal.

The test in question is based upon what may conveniently be described as the *line theory* propounded for the first time by Dr. Sarvadhikari in his Tagore Law Lectures of the year 1880. If the doctrine is well founded, the obvious result will be to exclude from heirship a number of blood relations who would be *sapindas* judged alone by the two tests accepted by the Privy Council. It is worthwhile to point out at the outset, that there is no mention of the doctrine, at any rate in express terms, either in the ancient smrithis, or in any of the numerous commentaries. It was only by a process of deductive reasoning that Dr. Sarvadhikari sought to formulate his theory, getting his clue, as he calls it, from the threefold classification of *bandhus* contained in the Mitakshara. The classification was not of Vijnaneswara's making ; it was there already in the shape of a fragmentary verse of Vriddhasatatapa which stated:

"The sons of his own father's sister, the sons of his own mother's sister and the sons of his own maternal uncle must be considered as his own cognate kindred ; the sons of his father's paternal aunt, the sons of his father's maternal aunt and, the sons of his father's maternal uncle must be deemed his father' cognates kindred the sons of his mother's paternal aunt, the sons of his mother's maternal aunt, and the sons of his mother's maternal uncle must be reckoned the mother's cognate kindred."

As observed by Vijnaneswara, the test divides the *bandhus* (cognates) into three classes, namely, *atma bandhavah* (आत्म बान्धवः), those related to the person himself, *pitru bandhavah* (पितृबान्धवः), those related to his father, and *matru bandhavah* (मातृबान्धवः), those related to his mother. All of them are *bandhus* of the owner, but the division is made use of by Vijnaneswara only for the purpose of establishing the order of priority as between the three classes and he makes this quite clear in Chapter II (*vi*) (2) by stating:

"Here, by reason of near affinity, the cognate kindred of the deceased himself, are his successors in the first instance ; on failure of them, his father's cognate kindred ; or, if there be none, his mother's cognate kindred. This must be understood to be the order of succession here intended."

The succession of *bandhus* (cognates) is dealt with in Chapter II, section (*vi*) which is devoted to an explanation of the word "*bandhu*" occurring in the text of Yajnavalkya, immediately after and in contradistinction to "*gotrajas*". The place of the *gotrajas* in the scheme of succession is prior to that of the *bandhus* and is accordingly first dealt with in section (*v*), placitum I where he states that the *gotrajas* (agnates) are the paternal grandmother, *sapindas* and *samanodakas*. In placitum 3 he states:

"On failure of the paternal grandmother, those sprung from the same family with the deceased (*sapindas*), namely, the paternal grandfather and the rest, inherit the estate."

Then follows the important statement,

"*Bhinna gotranam sapindanam bandhu sabdena grahanath,*"

भिन्नगोत्राणां सपिण्डानां बन्धु शब्देन ग्रहणात् ।

meaning that sapindas who belong to a different *gotra* (family) are indicated by the word *bandhu.* From this it is reasonably clear that Vijnaneswara divided the *sapindas* into two classes, namely, the *gotrajas* (agnates) or those born in the *gotra* or family of the propositus, and the *bandhus* (cognates) or those born in a different family. So it is that when he opens his discussion on *bandhu* succession in section (*vi*) he starts by saying that on failure of agnates (*gotrajabhave*) (गोत्रजाभावे) cognates

(*bandhavah*) (बान्धवाः) are heirs. Thus there can be little doubt that Vijnaneswara has used the terms *bandhu* and *bhinna gotra sapinda* as synonymous with each other. The matter is placed beyond controversy by the decision of the Board in *Ramachandra Martand Waiker* v. *Vinayak Venkatesh Kothekar*[1], where Mr. Ameer Ali observes at page 413:

"Vijnaneswara in reality seems to have shaped the rules which govern this branch of the law of inheritance . . . . . . In paragraph 3, section 5, (Colebrooke's Translation) in describing the *gotraja sapinda* or consanguineous relations sprung from the same stock, he emphasises the fact of their being members of the same family by the specific statement that the *sapindas* belonging to a different family (*gotra*)—the *bhinna gotra*—are included under the designation of *bandhus*. This is clearly borne out by the passage of the Viramitrodaya already referred to. Henceforth the word *bandhu*, therefore, has, in the system of the Mitakshara, a distinctive and technical meaning, in other words it signifies the *bhinna gotra sapindas*."

Again at page 415,

"Now, a *bhinna gotra sapinda* is a bandhu according to Vijnaneswara. The classification contained in section 6, Chapter II (Colebrooke's Translation) shows clearly who the *bandhus* are whom Vijnaneswara treats as *bhinna gotra sapindas* entitled to succession on failure of the *gotraja*."

Their Lordships then set out the contents of Chapter II, section 6 of the Mitakshara as rendered by Colebrooke and after referring to the division of *bandhus* into the three classes mentioned above finally state their conclusion in the following words :

"Their Lordships have little doubt reading these passages by the light of the comments in Viramitrodaya (at page 200) that Vijnaneswara was using the term *bandhu* in a restricted and technical sense, as implying a relation belonging to a different family but united by *sapinda* relationship. In fact he expressly says so (paragraph 3, section 5, Chapter II)."

That the words *bhinna gotra sapinda* and *bandhu* are to be understood as synonymous has thus been expressly ruled by the Privy Council. The point has to be stressed because of a somewhat different view expressed by Mukerji, J., in a Full Bench decision of the Allahabad High Court which will be referred to later.

The meaning of the words *bhinna gotra sapinda* next falls to be considered. *Bhinna gotra* only means born of a different family, and there has never been any uncertainty about its meaning. But such is not the case with the word *sapinda*. Whatever its ancient, time-honoured meaning, Vijnaneswara gave it a new orientation, involving far-reaching consequences. "Community in the offering of funeral oblations (*pinda*)" was indeed the old meaning. But the word "*pinda*" in Sanskrit occurring in the compound noun *sapinda* has another meaning also, namely, the body of the corporeal frame of a person. It was this meaning which Vijnaneswara applied to the word as the one most appropriate, expressly rejecting the older sense so long current. Accordingly he defined *sapinda* relationship as arising between two persons through their being connected by particles of one body. The definition was undoubtedly bold and novel, but found wide acceptance not only on account of the eminence of the author, but also because it accorded with the general sense of the community. The consequence was a revolution in the theory underlying the law of succession. The principle of religious efficacy went by the board, giving place to propinquity of blood relationship as the governing factor in determining questions of succession. Vijnaneswara followed up his explanation by the express injunction that wherever the word "*sapinda*" occurs in the Mitakshara it should be understood as only meaning "a connection with one body either immediately or by descent." He then took up the subject of degrees and observed, "In the explanation of the word '*asapindam*' (non-*sapinda*, verse 52) it has been said that *sapinda*—relation arises from the circumstances that particles of one body have entered (into the bodies of the persons thus related) either immediately or through (transmission by) descent. But inasmuch as this definition would be too wide, since such a relationship exists in the eternal circle of births, in some manner or other, between all men, therefore the author (Yajnavalkya) says : Verse 53, "After the fifth ancestor on the mother's and after the seventh on the father's side"—"on the mother's side in the mother's line after the fifth, on the father's side in the father's line, after the seventh

1. (1914) 27 M.L.J. 333 : L.R. 41 I.A. 290 : I.L.R. 42 Cal. 384 (P.C.).

(ancestor) the *sapinda* relationship ceases ; these latter two words must be understood; and therefore the word *sapinda* which on account of its (etymological) import (connected by having in common) particles (of one body) would apply to all men, is restricted in its signification, just as the word *pankaja* (which etymologically means "growing in the mud", and therefore would apply to all plants growing in the mud, designates the lotus only) and the like ; and thus the six descendants, beginning with the son, and one's self (counted) as the seventh (in each case), are *sapindas* relations" (West and Buhler, Volume I, page 120). It is significant that the only limitation here recognised, on what would otherwise be too wide a definition is the limitation of degree. If we are to impose a further limitation, we must have the sanction of a superior authority such as we have in the case of mutuality.

This passage as well as a free rendering of it by Dr. Sarvadhikari were referred to by the Privy Council and then the following emphatic statement was made by their Lordships,

> "Their Lordships have no manner of doubt that in the passages quoted above, Vijnaneswara was laying down rules for the limitation of *sapinda*—relationship generally."

Their Lordships concluded the discussion by stating that the right of inheritance is founded on *sapinda* relationship, which under the Mitakshara means consanguinity in a distinct legal sense clearly explained by the author. After this authoritative pronouncement it is needless to labour the point. It must be taken as established that connection through particles of one body, in other words, blood relationship, but within the degrees specified, is to be the prime consideration ; supplemented, of course, by the test of mutuality. While on the question of mutuality Sarvadhikari was referred to with approval nowhere in this judgment is there any reference to his *line theory*. We must therefore take it that the doctrine has been neither approved nor disapproved by the Privy Council so far.

The following tables indicate the *bandhus* mentioned by Vriddhasatatapa :

I. ATMA BANDHUS.

TABLE 1.

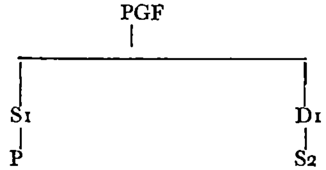
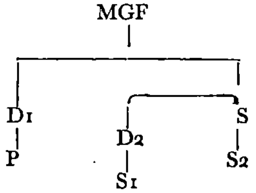


TABLE 2.



PGF represents the paternal grandfather, MGF the maternal grandfather, S and D, a male and a female descendant respectively. P is the propositus. S2 in table (1) and S1 and S2 in table (2) are the *atma bandhus.*

II. PITRU BANDHUS.

TABLE 1.

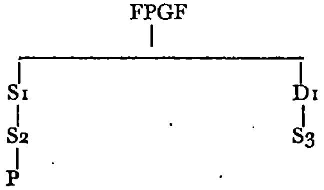
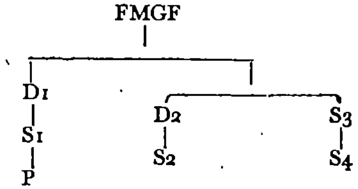


TABLE 2.



FPGF stands for the father's paternal grandfather and FMGF for the father's maternal grandfather. S3 in table (1) and S2 and S4 in table (2) are the *pitru bandhus.*

III. MATRU BANDHUS.

TABLE 1.

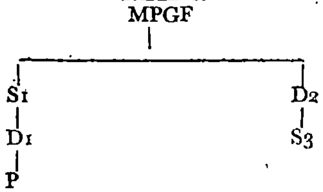
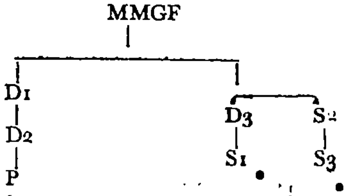


TABLE 2.



MPGF stands for the mother's paternal grandfather, and MMGF for the mother's maternal grandfather. S3 in table (1) and S1 and S3 in table (2) are the *matru bandhus*.

A glance at these tables of *bandhus* will show that the *atma bandhus* are the descendants of the paternal grandfather and of the maternal grandfather of the propositus. The *pitru bandhus* are the descendants of the father's paternal grandfather and the father's maternal grandfather. The *matru bandhus* are the descendants of the mother's paternal grandfather and the mother's maternal grandfather. It will be observed that the enumeration of *atma bandhus* takes in three degrees only, while the *pitru bandhus* and the *matru bandhus* go up to four only and not more. The lists are therefore incomplete not only because the ascendants and the descendants up to five or seven degrees as the case may be, are not mentioned, but two whole groups, namely, his own and his father's cognate descendants are conspicuous by their absence. Also, nearer relations like the maternal uncle have been omitted, while the maternal uncle's son is mentioned. The enumeration was accordingly held not to be exhaustive, but only illustrative and this was decided so early as 1868 in *Gridharilal Roy* v. *The Government of Bengal*[1]. It is, therefore, manifest that the enumeration has to be extended both upwards and downwards, in order to have a complete picture. It is in the making of this extension that the line theory is sought to be introduced. What is said is that the extension can only be made along the agnatic line of the topmost ancestor named in the text and not otherwise. On this theory Dr. Sarvadhikari states the rule as follows :

"The heritable right will accrue to a cognate *sapinda* of the deceased, if (1) the former be in the latter's descending line ; (2) if he be in the deceased owner's father's family ; (3) if he be in the latter-proprietor's maternal grandfather's line ; (4) in his father's maternal grandfather's line ; (5) in his mother's maternal grandfather's line."

The same proposition is echoed by Mukherji, J., in *Gajadhar Prasad* v. *Gouri Shanker*[2], where he says :

"The *bandhu* may be one in propositus's father's line, which would include his own line, either ascending or descending, because the descending line also would be his father's line through the propositus himself."

The learned Judge here combines groups 1 and 2 into one group,

"Secondly, we shall find the *bandhus* in the propositus's maternal grandfather's line. Thirdly, we shall find a *bandhu* in propositus's father's maternal grandfather's line ; and fourthly, we shall find a *bandhu* in propositus's mother's maternal grandfather's line."

By *line* is here meant the agnatic line "for lineage is traced through the male ancestors and male descendants and nobody else. Mother's father's line would mean maternal grandfather, his father, his father and so on. Maternal grandfather's line or even mother's line would *not* mean mother's mother, her mother, her mother and so on." As already observed, if this principle is applied, a great many *bandhus* who are *sapindas* within the limits laid down by the Mitakshara, will be left out. The following table is a complete list of the *bandhus* in the several possible chains, each of which is composed of an ancestor and four descendants so as to make up five degrees. Where the degrees are to be seven, two more links have to be added between S1 and the next link immediately below, in the several chains. The chains themselves will then increase in number by a process of permutation and combination. But to understand and appreciate the position it is sufficient to have chains of ascendants or descendants made up of five links only :

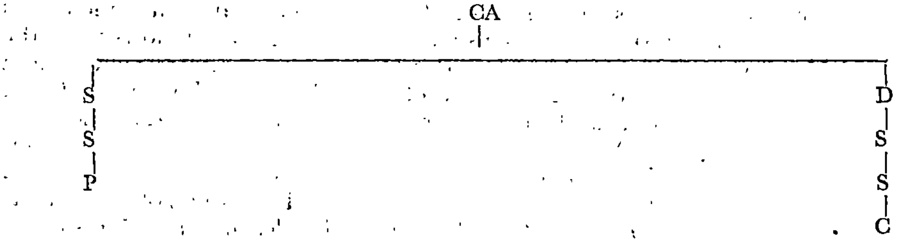
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
S1	S1	S1	S1	S1	S1	S1	S1
|	|	|	|	|	|	|	|
S2	S2	S2	D	D	D	D	S2
|	|	|	|	|	|	|	|
D	S3	D	S2	D	S2	D	S3
|	|	|	|	|	|	|	|
D	D	S3	D	S2	S3	D	S4
|	|	|	|	|	|	|	|
S3	S4	S4	S3	S3	S4	S2	S5

S1 in all the chains is the common ancestor, Chain No. 8 is made up purely of agnates. Any one of the last four links in this chain can be a *bandhu* of any one male

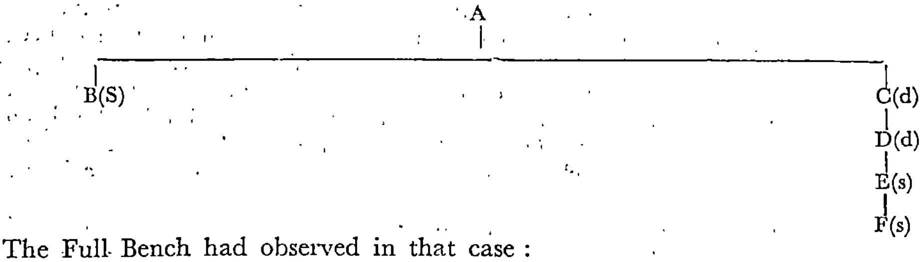
1. (1868) 12 M.I.A. 448.
2. (1932) I.L.R. 54 All. 698 at 699 (F.B.).

(S) in the last four in any of the other seven chains and *vice versa*. As between chains 1 to 7 the ascending and the descending lines from the common ancestor can be made up in the manner indicated by any one or more of them. These chains have been constructed without reference to the line theory and will help to show how the theory will work. The enumerated *atma bandhus* are the descendants of S2 in chains 4 and 6. The *pitru bandhus* are the descendants of S2 in chains 3 and 8 and the *matru bandhus* are among the descendants of S2 in chains 1 and 2. The fourth in ascent in chains 4 to 7 is (D) a female and does not get into the enumeration. In these chains the common ancestor S1 is not an agnatic ascendant of the lowest link representing the propositus or the claimant as the case may be, or of his father; nor is he an agnatic ascendant of the maternal grandfather. He is also not in the line of either the father's paternal grandfather, which is the same thing as the propositus's own line, nor is he in the line of the father's maternal grandfather. He is also not in the line of the mother's paternal or maternal grandfather. None of the last descendants in any of these four lines, can be a heir in the line theory of Dr. Sarvadhikari. The proposition may be stated by saying that in going upwards from the propositus or the claimant, neither the fourth nor any higher link can be a female or in the words of Sulaiman, J., in *Gajadhar Prasad* v. *Gouri Shankar*[1], there can only be a male ancestor above the grandparents on both sides.

The soundness of the line test came up for consideration in this Court for the first time in *Chinna Pichu Aiyangar* v. *Padmanabha Aiyangar*[2]. The propositus (P) and the claimant (C) were related to each other through the common ancestor (CA) in the manner shown in the following diagram :



One of the learned Judges who constituted the Division Bench, Napier, J., accepted the line theory of Dr. Sarvadhikari on the ground that it is supported by the decision of the Calcutta High Court in *Umaid Bahadur* v. *Udoi Chand*[3], where the relationship of the claimant and the propositus was as indicated below :



The Full Bench had observed in that case :

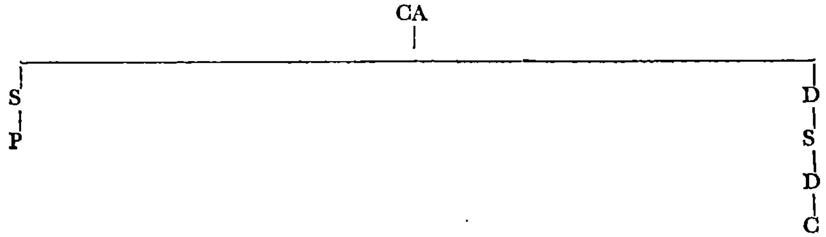
> "Although F is within six degrees from the common ancestor, yet B (the propositus) not being a descendant of the line of the maternal grandfather, either of F or of his father or mother, they are not *sapindas* of each other."

This observation was clearly an *obiter dictum*, but it was accepted by Napier, J., on the ground that the Bench used it "as axiomatic of the principle governing the relationship between the *bandhus*". But Sadasiva Ayyar, J., was not prepared to agree with Napier, J., and he in fact expressed the opinion that the conclusion reached by the Calcutta High Court is fallacious. He also characterised the doctrine of Dr. Sarvadhikari as the result of far-fetched deductions. In the view expressed by the learned Judge he should have logically dissented from Napier, J., but he

1. (1932) I.L.R. 54 All. 698 at 699 (F.B.). 121.
2. (1920) 39 M.L.J. 417 : I.L.R. 44 Mad. 3. (1880) I.L.R. 6 Cal. 119 (F.B.).

concurred with him "on the somewhat curious ground that he is generally against claims by remote relations and that only by legislation the anomalies of the present law could be removed." The decision exhibits a pronounced difference of opinion on the principle under consideration, Napier, J., accepting it and Sadasiva Ayyar, J., rejecting it.

The doctrine received close and careful attention from Spencer and Venkatasubba Rao, JJ., in *Kesar Singh* v. *Secretary of State for India*[1]. After a full consideration of all the relevant material, the learned Judges unhesitatingly held that it was not well founded. The relationship between the parties may be indicated by the following tables ; where CA is the common ancestor, P the propositus and C the claimant, D represents a female and S a male :



It will be seen that the tests of degree as well as mutuality were satisfied in this case and the only question was whether the line theory of Dr. Sarvadhikari was well founded. If well founded, the claimant would not have been a heritable *bandhu* and the estate would have escheated to the Crown. The leading judgment was that of Venkatasubba Rao, J. His reasons may be summed up as follows : (1) the doctrine does not find support in any ancient text or recognised commentary and is not justified by any authority ; (2) the view of the Calcutta High Court in *Umaid Bahadur* v. *Udoi Chand*[2] favouring the line theory is clearly an *obiter dictum*; and (3) a rule which has the effect of unduly limiting the *bandhus* who can inherit, should not be accepted without sufficient support for it in the texts or commentaries. The matter would have rested there but for the decision of the Full Bench of the Allahabad High Court in *Gajadhar Prasad* v. *Gouri Shankar*[3]. The learned Judges dissented from *Kesar Singh's case*[1] and gave their adherence to the line theory of Dr. Sarvadhikari supporting it by fresh argument. The relationship of the claimant in the two cases was identical. Mukherji, J., delivered the leading judgment. As before us, the appellant's learned advocate strongly relied on this case, and in fact, derived most of his arguments from this judgment, it is necessary to go over the grounds on which the learned Judge has based his conclusions. The first argument is furnished, it is said, by Vijnaneswara himself in his commentary on Yajnavalkya's verse, I, 53, quoted above, where he enunciates the rule of prohibited degrees of marriage. The relevant passage which was originally translated by West and Buhler, has been quoted *in extenso* in *Ramachandra Martand Waiker* v. *Vinayak Venkatesh Kothekar*[4]. The particular portion of it which has been relied on in the present case is the following :

> "Accordingly it is to be understood that the fifth from the mother is she who is in the *line* of descent from (any ancestor of the mother) up to the fifth ancestor, beginning with the mother, and counting her father, grandfather and the like."

It may at once be conceded that Vijnaneswara here refers only to the agnatic line of the mother and this may also be taken to be the ordinary Hindu conception of the *sapinda* relationship, based on the old spiritual theory of an agnatic group bound together by community of religious offerings. But it does not follow from this that in his scheme of *bandhu* succession Vijnaneswara intended to lay down that the *sapindaship* runs only along the agnatic line which is but an application though partial, of the discarded doctrine of spiritual efficacy. Such a meaning is directly opposed to the elaborate explanation which he has given of the word "*sapinda*"

1. (1926) 51 M.L.J. 16 : I.L.R. 49 Mad. 652.
2. (1880) I.L.R. 6 Cal. 119 (F.B.).
3. (1932) I.L.R. 54 All. 698 at 699 (F.B.).
4. (1914) 27 M.L.J. 333 : L.R. 41 I.A. 290 : I.L.R. 42 Cal. 384 (P.C.).

in his commentary on just the previous verse of Yajnavalkya, where he took great pains to show that it meant a connection through particles of one body and not a connection by oblations offered to ancestors. The following passage of the Mitakshara in Srish Chandra Vidyarnava's translation, at pages 95, 97, emphasises the point :

> " The *sapinda* relationship is certainly to be described by the entering of the particles of a common body. Because on account of the Sruti (Aitareya Brahmana, VIII, 13.6)—
>
> ' (In him) the self is born out of self.' Thus also (Tait. Br. 1-5-5-6). ' Thus thou art born again in thy offspring' : so also is the text of Apasthamba (II. 9.24.2): 'Now it can also be perceived by the senses that the father has been reproduced separately in the son.' So also in the Garbha Upanishad : ' Of this body consisting of six sheaths, three are from the father, and three from the mother. The bones, the nerves and the marrow are from the father ; the skin, the flesh and the blood are from the mother.'
>
> In all these passages, the entering of the particles of the body is being demonstrated.
>
> But if the *sapinda* relationship be taken to mean those who are connected through the offering of the same *pinda* to an ancestor, then there would be no *sapinda* relationship in the mother's line, or in the brother's sons and the rest."

It is interesting to note how Balambhatta understands the word " mother's line " (*matru santane*) in the above passage. He comments—

> " In the ' mother's line ' : the meaning is, in the fifth female descendant (kanyayam) from one root ancestor, whose line is made up of his daughter,her daughter, her daughter and her daughter. In the mother's line it is said ' fifth ' because in his (Vijnaneswara) view it (the *sapindaship*) extends only up to the fifth (degree) and it ceases thereafter. Though those who really share in the offerings made (by any descendant) up to the fourth female descendant do also share in the offerings made by the others (the remaining three), it (such a sharing) is wholly non-existent in the offerings made by the fifth."

This is a literal translation closer to the text than Srish Chandra Vidyarnava's at page 97. The text is this :

मातृसंताने इति । एकस्मान्मूलपुरुषात्कन्या तत्कन्या तत्कन्या तत्कन्येत्येवं पञ्चम्यां कन्यायामित्यर्थः । मातृसंताने पञ्चमपर्यन्तमेव तत् , तदूर्ध्वम् निवृत्तिरित्यस्येष्टत्वेन पञ्चम्यामित्युक्तम् । चतुर्थपर्यन्तं तत्कर्तृकतत्क्रियायां येषां तत्त्वेनानुप्रवेशस्तेषां परभागसंतानकर्तृकाक्रियायामनुप्रवेशसत्त्वेऽपि पञ्चमीकर्तृकाक्रियायां सर्वथा तदभावात् ।

Balambhatta's interpretation shows the mistake of understanding the word '*santana*' in the sense in which it is popularly understood, that is, the agnatic line. We feel no doubt that Vijnaneswara's explanation in the passage relied on was only meant to illustrate and not to restrict the *sapinda* relationship to the agnatic line of the father or the mother, or of the father's maternal grandfather or of the mother's maternal or paternal grandfather. The text of Vriddhasatatapa itself furnishes a decisive answer to the opposite interpretation. The father's maternal aunt's son, the father's maternal uncle's son, the mother's maternal aunt's son and the mother's maternal uncle's son are not in the line of the mother or the father of the owner, and they cannot be his *bandhus* on the line theory strictly applied. Mukherji, J., perceives the discrepancy, but is satisfied with the answer that the relationship of *bandhu* indicated by the text is an expansion of the definition of *sapinda* which should of course be taken to be limited by the line theory. The following passage at page 729 of the report sums up his view :

> " We may now conclude that if the claimant to heirship be a *bandhu* of the deceased person but if the deceased person be not a *sapinda* of the claimant, the claim will fail, for Manu says, ' A *sapinda's* property shall be taken by a *sapinda*.' But if the deceased be related to the claimant as a *bandhu, i.e.,* if both the deceased and the claimant be each other's *bandhu* the claim will succeed."

Instead of regarding the words "*bhinna gotra sapinda* " and " *bandhu* " as synonymous which is the only correct meaning as laid down by Vijnaneswara and the Privy Council, the learned Judge found himself obliged to take up the somewhat anomalous position that the word "*sapinda* " is narrowed by the line theory and expanded by the old text. It is, in our opinion, simpler and more in consonance with the express statements of the Mitakshara to take the word in the sense explained, and when that is done it will be found that the text of Vriddhasatatapa creates no difficulty. The enumeration has only to be understood as illustrative of the rule of Mitakshara, and not as a rule in itself.

The next argument is that the words *pitru bandhu* and *matru bandhu* should not have been taken as father's *bandhus* or mother's *bandhus*. These expressions are made use of by Vijnaneswara only for the limited purpose of establishing the order of preference among the classes, all of whom are *bandhus* of the propositus. It is not necessary to put a strained meaning on these words, for ordinarily, "*santana*" means the agnatic line even as the word "*sapinda*" means agnates. But it is to be observed however that no commentator has interpreted *pitru bandhus* and *matru bandhus* as meaning *bandhus* "by reason of" or "through" the father or the mother. On the contrary, the Mayukha definitely supports the possessive sense which is the only sense in which the word *atma bandhu* occurring in the same collocation can be understood. Mayukha IV, *viii*, 22, in commenting on Vriddhasatatapa's text says,

"It may be said 'Indeed, of the wife and all the rest, the right to take the wealth is derived from their relation to the deceased himself; even so let the right of the *bandhavas* be; how then can the *bandhavas of* the father and *of* the mother have a right to the wealth'."

ननु पत्न्यादीनां सर्वेषां मृतनिरूपितानामेव धनभाक्त्वम् ।
बान्धवानामपि तथैवास्तु । अतः पितुर्मातुश्च बान्धवानां धनसंबन्धः ।

There is no support for the strained construction which has found favour with the Allahabad High Court in any of the commentaries and the meaning adopted is, we say it with due respect, neither natural nor usual. Nor is there any sufficient justification for drawing a distinction between *bandhu* and *bandhava*, for etymologically there is none.

बन्धुरेव बान्धवः स्वार्थे अण् ।

Both words are sometimes used in a very wide sense as including all relations, cognates, and agnates; and even friends, as the literal meaning is "he who binds the mind by love".

स्नेहेन मनो बध्नाति यः । (Sabdha Kalpadruma).

But Vijnaneswara has used the word in the technical sense, and there can be no doubt that he reads the text which uses the long vowel in the same sense.

We are again unable to follow how if the words *pitru bandhu* and *matru bandhu* are understood as meaning father's *bandhu* and mother's *bandhu* respectively, the classification becomes useless or meaningless. So long as the limitation of degrees is operative, there is no scope for the argument that all the relations howsoever remote will come in. It is then asked, what was the necessity for a division of the *bandhus* into three classes, as it would have been quite sufficient to say that all cognate relations of the owner within five degrees are *bandhus*? But the text which contains the classification is not Vijnaneswara's and it is not to be forgotten that the classification as already explained is adopted solely for the purpose of fixing the order of priority, the upward limit alone being indicated in the enumeration of the *atma bandhus*. The degrees laid down can under no circumstances be extended, and it follows that the mention of the *pitru bandhus* and *matru bandhus* does not mean that the degrees are to be counted not from the propositus but from the father and the mother, in which event only the degrees will go up to six. The criticism therefore that the possessive sense is inappropriate does not appear to be well founded. With all respect therefore to the learned Judges who decided *Gajadhar's case*[1] we are unable to share their opinion that the line theory is well founded. It is not for us to evolve and lay down theories which have the effect of overriding or qualifying the express definitions of the Mitakshara, unless they are necessarily to be implied from the statements of the commentator, or plainly follow from them. *Sapindaship* has been defined, and to that definition we must adhere without seeking to hedge it in by new formulæ. It is true that the test of mutuality is not apparent from what Vijnaneswara has said. But the final word has been pronounced by the Privy Council, and all controversy is now at an end. That Dr. Sarvadhikari is a learned

1. (1932) I.L.R. 54 All. 698 at 699 (F.B.).

author and that it was he who enunciated the test of mutuality which has now passed into the law, is no reason for our accepting his line theory also, merely on his authority. We consider that *Kesar Singh's case*[1] (the correctness of this decision has been accepted in the latest editions of Mayne, 642, and Mullah, 53, 54), has been correctly decided and that decision governs the present case.

The result is that the second appeal fails and is dismissed with costs.

K.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MOCKETT AND MR. JUSTICE KUNHI RAMAN.

Nallathambi Pillai *alias* Nallasami Pillai and others .. *Petitioners**

v.

Rahumath Bivi and others .. *Respondents.*

Civil Procedure Code (V of 1908), section 110—Leave to appeal to Privy Council—Substantial question of law—Nature of—Refusal to grant leave.

Where the only question of law raised in an application for leave to appeal to the Privy Council was whether the introduction by the son as manager of an ancestral business, of a stranger as a partner therein, caused the business to cease to be ancestral,

Held, that in view of the point being substantially covered by the decision of the Judicial Committee in *Sri Thakur Ramakrishna Murarji* v. *Ratanchand*, (1931) 61 M.L.J. 665 : L.R. 58 I.A. 173 : I.L.R. 53 All. 190 (P.C.) and the absence of any conflict of views in India on the question, no substantial question of law fairly open to argument remained, and hence leave under section 110, Civil Procedure Code, should be refused.

Petition under sections 109 and 110 and Order 45, rules 3 and 8 of the Civil Procedure Code, praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to grant leave to the petitioners herein to appeal to his Majesty in Council against the judgment and decree of the High Court in Appeal No. 350 of 1937, preferred against the decree of the Court of the Subordinate Judge of Sivaganga in O. S. No. 18 of 1930.

K. V. Krishnaswami Aiyar for *K. V. Ramachandra Aiyar* for Petitioners.

B. Sitarama Rao for *V. Ramaswami Aiyar* for Respondents.

The Court made the following

ORDER.—This is an application for leave to appeal to the Privy Council by the appellant in A. S. No. 350 of 1937 decided by us. It is beyond doubt that the subject-matter of the suit exceeds Rs. 10,000 and it is a confirming judgment. The appellant, however, contends that the appeal involves a substantial question of law. It is unnecessary for us to recapitulate the history of this case which is set out in our judgment and in that of the lower Court. It will be sufficient if we state the two grounds on which this application has before us been based. They are to be found in the first and the second grounds of appeal. They are,

(1) The learned Judges ought to have held that the introduction of partners by the first defendant into a business though of the same kind as the business conducted by the father individually and without partners deprived the newly constituted partnership business of its character as an ancestral business.

(2) The learned Judges erred in holding that the fact of the father of the first defendant having taken a toll gate contract for one year two or three years before his death in 1914 would constitute the son's taking toll gate contracts in 1923 as the carrying on of an ancestral business of taking toll gate contracts.

We will deal with the second ground first. In our opinion no question of law is raised. The question of fact which had to be considered was whether the toll gate contract business was or was not an ancestral business. There was evidence on the record both of the first defendant and of the plaintiff that the father of the first defendant was taking toll gate contracts, and it was not the finding of this Bench that only one contract was taken by the father although it is true that an example of one was given by the plaintiff in cross-examination. There was evidence that the father of the first defendant had indulged in various activities all of which were

---

1. (1926) 51 M.L.J. 16 : I.L.R. 49 Mad. 652.

*C. M. P. No. 3046 of 1942. 20th January, 1943.

comprehended in one set of accounts, which businesses were continued by the first defendant. As to whether a family business is ancestral or not must necessarily be a question of fact and accordingly we are unable to say that any question of law is raised by this ground of appeal.

With regard to the first ground of appeal, the facts were that after the death of the first defendant's father the first defendant, who was the manager of the ancestral business, took into partnership a stranger, and the question which was argued was whether the taking of a stranger partner into the ancestral business caused that business to cease to be ancestral by itself. That it raises a question of law is beyond doubt. We have to decide whether a substantial question of law was raised. This is not a matter on which there is an absence of authority. On the other hand, the authorities appear to point all one way, namely, that taking a partner by the manager does not cause an ancestral business to cease to be ancestral. It was so held in *Ramlal Thakursidar* v. *Lakshmichand Muniram et al*[1], where the proposition is laid down in the clearest possible terms. It is not suggested that the authority of this case has been doubted. The matter has not directly come under consideration by the Judicial Committee; but in *Sri Thakur Ramakrishna Murarji* v. *Ratanchand*[2], their Lordships held that where an ancestral business of a Mitakshara joint family had been carried on in partnership with another person, and upon his retiring there had been a dissolution and winding up of the partnership, the business carried on immediately thereafter on behalf of the joint family in the same commodities and upon the same premises, though under a new firm name and with new books, was not a new business but a continuation of the ancestral business. That, of course, is the converse of the present position. In that case the facts were that the father and manager of a joint Hindu family who was the proprietor of an ancestral business took a stranger as a partner. After the death of the father the partnership was continued by the son who succeeded the father as the managing member. Some time later the stranger partner retired from the partnership and the business continued to be carried on by the son without any other partners. The view taken by their Lordships clearly indicates that the presence of the stranger as partner either during the lifetime of the father or after his death during the time that the son continued the partnership did not affect the legal character of the business. It appears to us that this decision of their Lordships substantially covers the point now argued before us. That was the view adopted by the Nagpur High Court in *Bhagwan Singh* v. *Beharilal*[3], where the point before us was directly decided contrary to the contentions now argued by the appellant. We are in complete agreement with the Nagpur decision. The decision of the Calcutta High Court in *Shewkissen* v. *Mangachand*[4] does not, in our opinion, in any way assist the appellant. In that case a business on the same lines as an ancestral business was started by the manager of a joint Hindu family at fresh centres with strangers as partners, such strangers being in control of the business. On the facts Mitter and Khundkar, JJ., held that this was a new business and not a continuation of the ancestral business. Apparently the learned Judges were impressed by the evidence that control of the business was given to a new stranger partner and did not remain with the joint family. That being the position, can the point of law before us be said to be "substantial"? It has, in our view, been virtually decided by the Judicial Committee because we are unable to understand why the principles laid down by their Lordships would not be equally applicable to the facts before us and as stated by Page, C. J., and Ba U, J., in *M. C. Patail* v. *H.G. Ariff*[5], we do not think that it is "fairly open to argument" that the position is otherwise. Furthermore, as we have pointed out, there has been the unshaken view of the Bombay High Court since 1861 and the more recent view of the Nagpur High Court directly against the appellant. There is no authority in his favour. Unless it can be said that no matter which is not entirely covered by a decision of the Judicial Committee can cease to be a substantial

1. (1861) 1 Bom.H.C.R. 51 at page 71 (Appendix).
2. (1931) 61 M.L.J. 665 : L.R. 58 I.A. 173 : I.L.R. 53 All. 190 (P.C.).
3. I.L.R. (1938) Nag. 221.
4. (1940) 45 C.W.N. 478.
5. (1935) I.L.R. 13 Rang. 744.

question of law, there is no substance in the appellant's contention, and as we have pointed out there is no conflict of views in India. We therefore consider that we are prohibited by the provisions of section 110 of the Civil Procedure Code from granting leave to appeal in this case and for the reasons which we have given we dismiss the petition with costs.

K.C. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Vridhichand Sowcar and others .. *Appellants** (*Accused 3, 2 and 1*).

Criminal trial—Charge to the jury—Benefit of doubt to be given to the accused mentioned in the beginning and not in the end—Not sufficient to affect verdict—Points regarding dacoity not clearly made out in charge—Effect.

The fact that a Sessions Judge in his charge to the jury gave the advice, regarding the benefit of the doubt to be given to the accused, in the beginning of his charge instead of at the end can hardly be considered misleading, though it is advisable to give the caution at the end of the charge.

The fact that the trial Judge did not point out sufficiently to the jury in a trial on a charge of dacoity that the jury must be satisfied that there were five persons taking part in the dacoity, even if some of the accused were held by them to be not guilty, was not a defect which would in itself be a sufficient ground for setting aside the conviction.

Appeals against the order of the Court of Session of the Chingleput Division in Case No. 31 of the Calendar for 1941.

Md. Askar Ali, Abdus Samad, Amir Ali, V. Rajagopalachari, A. S. Veeraraghava Aiyar and *N. Srinivasan* for Appellants.

N. Somasundaram for the Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court delivered the following

JUDGMENT.—The three appellants were three of the four accused in the Court of the Sessions Judge of Chingleput who were charged under section 395 of the Indian Penal Code with dacoity. The three appellants were found guilty by a unanimous verdict of the jury and were sentenced by the Sessions Judge to five years' rigorous imprisonment.

The prosecution case is that the third accused entertained some animosity against P. W. 6, the complainant, and engaged a number of persons to break into his house to attack him and beat him, to do the same to his women, and then to help themselves to whatever property they could lay hands on. In accordance with that plan, the 3rd accused took the other accused and one or two more men in a car to a place near the house of P. W. 6. They watched P. W. 6's house for some time, and when they saw that he and his family had retired to rest, they entered the house. To some extent the plan miscarried, in that P. W. 6 and his women-folk made so much noise that neighbours were attracted and the accused had to decamp without having taken anything more than a jewel from the person of Mangi Bai, the daughter of P. W. 6. The first accused, in trying to escape, fell into a well and was caught at once. Seeing that the game was up, he made a confession which led to the discovery of all the incidents in the plot and in the offence.

The case was tried by jury; and so the only questions that arise here are whether there was any misdirection to the jury and if so, whether as a result of the misdirection the jury returned an erroneous verdict.

Many criticisms have been made of the charge delivered to the jury; but most of them do not call for any remarks. It is true that the learned Sessions Judge may have put many of the points with some advantage in a slightly different way which would perhaps have made the charge a little more favourable to the accused; but for the most part I cannot say that the Judge has not put the matters correctly and fairly before the jury.

One of the important witnesses in the case was a constable, P. W. 10, who had seen the third accused loitering near his station at 12-30 in the night and who later heard a disturbance from the house of P. W. 6 where the offence took place. When he came out of the station he saw the third accused running away from the

*Crl. As. Nos. 842 and 865 of 1941 and 34 of 1942. 18th March, 1942.

house of P. W. 6 to his own house, which he entered. In cross-examination, the attention of this witness was drawn to the fact that the note book in which the matter had been recorded did not mention the time ; and in order to show that this entry in the note book was not made subsequently, as a kind of after-thought, the constable stated that he had told the Circle Inspector twice of this matter. The learned Sessions Judge has told the jury that the conduct of the constable supports his evidence that he made a note in the note book then and there. Although evidence of conduct is admissible and his statement to the Circle Inspector was admitted purely for that purpose, yet I am inclined to agree with the learned advocate for the third accused that it is not admissible because of the prohibition in section 162 of the Criminal Procedure Code. However, this point is after all a petty one ; whether or no the constable made an entry in his note book immediately seems to be of little importance.

Another point raised is that the learned Sessions Judge has not told the jury very clearly that in order that the offence of robbery and dacoity might be committed, it was necessary that the violence should have been

> " in order to the committing of the theft or in committing the theft or in carrying away or attempting to carry away property obtained by the theft."

In particular, this sentence in the charge

> " When five or more persons conjointly commit or attempt to commit robbery, that is theft accompanied by or involving violence ; person present and aiding such commission or attempt, every person so committing, attempting or aiding is said to commit dacoity,"

is said to convey an incorrect idea of the offence. But I find that earlier in the same paragraph the learned Sessions Judge has put the matter correctly before the jury ; for what he says is :

> " When five or more persons join in committing theft and when violence or threat of violence is used by any of them in order to the commission of the said theft or while committing the said theft or while taking away stolen property, they are said to commit dacoity."

I do not think that the jury could have been in any way misled by the more summary manner in which robbery is referred to later in the same paragraph.

I agree that it is advisable to tell the jury after the whole evidence has been discussed that they should give the benefit of the doubt to the accused. The learned Judge gave them that advice near the beginning of his charge. There are however many things that are better said at the end ; but obviously everything cannot be said at the end ; and I do not for a moment think that the fact that this caution was given at the beginning rather than at the end affected in any way the verdict of the jury.

The learned advocates for the appellants complain that the learned Sessions Judge has not put before the jury properly the circumstances bearing upon the question of the admissibility of the first accused's confession. I will go further than that and say that the learned Judge should not have charged the jury with regard to the evidence on this point ; because it is for the Judge to decide whether a confession is made voluntarily or not. If it falls under the bar of section 24 of the Evidence Act, it is not admissible in evidence ; and the admissibility of evidence is a question of law which the Judge has to decide for himself. Even though that point involves decisions on questions of fact, it is nevertheless for the Judge to decide the questions of fact which bear upon the admissibility of the confession. I have no doubt, however, that the learned Judge thought that the confession was admissible; and he was right. The first accused was practically caught red-handed. When he found himself in the well and unable to get out, he must have seen that it was of no use pretending that he had nothing to do with the house-breaking. He also seems to have thought, judging from some of the expressions used by him in his confession, that he had not been fairly remunerated by his employer, and so it was not at all unnatural that he should make a confession to the police and be willing subsequently to repeat that confession before the Magistrate. The learned Magistrate who recorded the confession seems to have bungled somewhat in his answers to the question whether he warned the accused that there was no intention of taking him as an approver ; but that is only one of the many questions set out in the

Criminal Rules of Practice as means whereby the Magistrate might assure himself that the confession is a voluntary one and is not brought about by any threat, coercion or inducement. The Magistrate did not make note that he asked such a question; but says that he did ask it. However, the other questions put by him and the circumstances under which the confession was made leave no doubt in my mind that the confession was a voluntary one. The earlier confession to the police is also admissible, in so far as it led to the discovery of the car in which persons were brought from Madras to the neighbourhood of P. W. 6's house. As a result of his confession the owner of the car was traced and many particulars in connection with this offence were revealed to the police.

It is not open to this Court in an appeal against a verdict by the jury to consider whether this Court would on the same evidence convict any one of the accused. The evidence against the second accused is very considerable; and I can hardly imagine that any jury would not find him guilty on that evidence. That against the third accused is much less; but it is sufficient to form a basis for a conviction. The learned Sessions Judge could not have told the jury that there was not sufficient evidence against this accused to warrant a conviction; that is, he could not have asked the jury to return a verdict of 'not guilty' against this accused. The evidence of P. Ws. 10 and 15 was sufficient in itself to lead to a conclusion that the third accused took part in the dacoity; but any doubt that might have been left in the minds of the jury on this question could be set at rest by the confession of the first accused, which could be taken into account even against the third accused.

Another point made by the learned advocates for the appellants is that the learned Judge should have emphasised more the fact that the confession made by the first accused was retracted even in the Court of the Committing Magistrate. The learned Judge might have said that; but I do not know what conclusion can be drawn from the retraction. In my experience, the accused always do retract their confession in the Committing Magistrate's Court if they are represented by counsel; and I certainly do not think that that is any reason—in this case at any rate—for doubting the truth of the confession made before the Magistrate under section 164, Criminal Procedure Code.

The last of the contentions of the learned counsel for the accused worth noting is that the learned Judge did not point out sufficiently to the jury that they must be satisfied that there were five persons taking part in the dacoity. There was substantial evidence that five persons did participate; but the learned Judge seems not to have foreseen the possibility that some of the accused might be held by the jury to be not guilty. So that he should have told the jury that in case they acquitted any of the accused, they should again consider whether in spite of their finding that one or more accused were not guilty, there were five persons participating in the offence. That defect in the charge would not in itself be a sufficient ground for setting aside the conviction; but I think that in this case the omission led to a wrong verdict. Although the learned Sessions Judge has discussed the confessions made by the first accused, he has not indicated that they leave us very much in doubt whether more than three persons entered the house. The confession to the Magistrate might lead one to the conclusion that four persons entered the house, although he specifically refers only to three, the fourth accused, the second accused, and himself; but in his confession to the police he made it pretty clear that only three persons entered the house. On the other hand we have the evidence of P. W. 6, his wife, and his daughter that five persons attacked them; but it is not at all improbable that they magnified the offence in order to make it still more serious against the third accused, who they knew was responsible for the staging of this attack on them and their property.. It is far more probable that the confession of the first accused on this point is true; for as far as we can test the confession, it seems correct. If there were three persons inside the house, then it is doubtful whether five persons took part in the dacoity. On the contrary, it seems more likely that there were only four. The third accused was keeping watch outside. There was also a Hindu by the name of Maruthi who came in the car; but according

to the first accused's confession, he seems not to have been given any part; and we cannot be at all sure that he was standing outside the house with the third accused. He seems not to have been seen by the constable, P. W. 10, who saw the third accused running away unaccompanied. The offence committed by the accused has not therefore been proved to be dacoity; but they are guilty of offences punishable under sections 457 and 392, Indian Penal Code.

It is unnecessary to send this case back for re-trial on the ground of this misdirection; because it can only affect the question of sentence. I therefore set aside the conviction under section 395, Indian Penal Code and convict the appellants under sections 457 and 392 reducing the sentences from five years' rigorous imprisonment to four years' rigorous imprisonment.

K.C. ——— *Sentence reduced.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

Rangayya Naidu and another .. *Petitioners**

v.

Sundaramurthy Mudaliar .. *Respondent.*

Negotiable Instruments Act (XXVI of 1881), section 87—Signature of one of the executants of a promissory note procured by payee—Effect on liability of other executants—Absence of plea or argument as to applicability of section 87—Duty of Court.

Where the signature of one of the executants of a promissory note is found to be a forgery the payee having procured the signature, though the signatures of the other executants are found to be genuine, there is a "material alteration" within the meaning of section 87 of the Negotiable Instruments Act rendering the note void. The fact that the forgery could make no difference in the liability of the other executants who had admittedly signed the bond is immaterial. It is unnecessary that a material alteration should be one which is prejudicial to the person who pleads it.

Amirtham Pillai v. *Nanja Goundan*, (1914) 26 M.L.J. 257 and *Santhu Mohideen Pillai* v. *Jamal Mohammad Jamaluddin*, A.I.R. 1928 Mad. 1092, relied on.

If the Court finds as a fact that there is a material alteration in a promissory note it ought to hold the note to be void under section 87 of the Negotiable Instruments Act even though a specific plea was not raised and no argument was advanced on it during the trial.

Petition under section 25 of Act IX of 1887, praying that the High Court will be pleased to revise the decree of the Court of the District Munsiff of Ranipet in S. C. S. No. 127 of 1941.

V. S. Chandrasekharan and *K. Raman* for Petitioners.

R. Thirumalai Thathachariar for Respondent.

The Court delivered the following

JUDGMENT.—This is a petition filed against the decree given by the learned District Munsiff of Ranipet in S. C. S. No. 127 of 1941. The suit was filed by the plaintiff as endorsee of a promissory note against three defendants. The first defendant is the father and guardian of his minor son the second defendant. It was alleged by the plaintiff that the promissory note had been signed by the first defendant both in his personal capacity and as guardian of his son the second defendant. The consideration of Rs. 243 was alleged to have been paid in cash. The first defendant admitted the genuineness of his signature in so far as it affected himself, but denied its genuineness in so far as he is supposed to have signed it as guardian of his son. He says, however, that when he signed the promissory note it was only a blank piece of paper and that he received only Rs. 5 as consideration and that amount also not from the payee but from the payee's step-son. The third defendant pleaded that his signature was forged.

The findings of the learned District Munsiff were that all the signatures of the first defendant were genuine and that the story that he signed on a blank piece of paper was incredible. The evidence of the plaintiff that Rs. 243 was paid in cash was also rejected and the learned District Munsiff held that only Rs. 5 was received by the first defendant. This, however, did not involve the practical dismissal of the suit, as he further held that consideration had already passed in the form of prior indebtedness to the payee's step-son. On these findings a decree was given as

*C. R. P. No. 752 of 1942. 5th February, 1943.

against the first defendant and against the second defendant to the extent of his joint family interest but the suit was dismissed as against the third defendant. This is a petition by the first and second defendants against that decree.

It was argued in the first place that there was no evidence upon which the findings can be based that the first and second defendants received consideration for the amount of the promissory note, in the sense that there is no positive statement by any witnesses which has been adopted by the learned District Munsiff in his judgment. This is no doubt true, but it seems to me that there is no law which prevents a Court from seeking the truth somewhere midway between the statements of parties to a suit. In this case, quite clearly, the learned District Munsiff holds, as the most significant feature in the case, that the first defendant could never have signed the promissory note if he had not received consideration in some way or other to the extent recited therein. It does not seem to me possible, therefore, to interfere with this decision on the ground that the findings of facts are based on no evidence.

It is next argued that the fact of the forging of the signature of the third defendant on the promissory note renders the note invalid as against defendants 1 and 2 also. There is a finding of fact in this connection that it was the payee who procured the signature of the third defendant. This time learned counsel for the respondent argues that there is no evidence upon which this finding can be based. Here again this statement is true in the sense that there is no positive or direct evidence ; but it seems to me that on all the facts and circumstances of the case and in particular the omission of the plaintiff to examine the payee herself, the learned District Munsiff was justified in holding that the forgery was brought about by the payee whom it would more directly benefit. I must therefore accept this finding of fact also.

The question then arises whether under section 87 of the Negotiable Instruments Act this is a material alteration which renders the note void. It might plausibly be argued in deciding this point between the plaintiff and defendants 1 and 2 that the forged signature of the third defendant could make no difference in the liability of the other defendants who have admittedly signed the bond. But it has been held that it is unnecessary that a material alteration should be one which is prejudicial to the person who pleads it. Even if it were beneficial as it may well be said to be in the present case, it still remains a material alteration. There are two decisions of learned Judges of this Court sitting singly—one reported in *Amirtham Pillai* v. *Nanja Goundan*[1] and the other reported in *Santhu Mohideen Pillai* v. *Jamal Mohammad Jamaluddin*[2]—which are clearly to the point and show that where at the instance of the plaintiff a party is fraudulently sought to be made liable on a promissory note, even the party who has admittedly executed such a note can escape liability by virtue of the provisions of section 87. With respect I follow these decisions and hold that in the present case there ought to have been a finding by the learned District Munsiff that the promissory note was void under section 87. The learned District Munsiff failed to give any such finding and failed even to consider this point although it had occurred to him during the trial that the point was of considerable importance and he included it as the fourth question which arose. He stated, however, that as there was no positive plea raising the applicability of section 87 and no argument on this point during the trial, that question did not arise. It seems to me that this is a wrong view to take of the duties of the Court if the facts which he finds give rise to a particular situation in which the Legislature has enacted that certain consequences must follow. Then it is for him to consider how the law should be applied whatever may be the failings of the parties in raising pleas or arguing before him. It is only of course, if he considered that it was necessary to plead and prove certain facts that his attitude would be justified. Here he has given, as already mentioned, the finding of fact, that the forging of the third defendant's signature was done at the instance of the payee. For the reasons I have given, this petition must be allowed and the suit of the plaintiff dismissed as against the petitioners with costs throughout.

K.S. ——— *Petition allowed.*

---

1. (1914) 26 M.L.J. 257. 2. A.I.R. 1928 Mad. 1092.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BYERS.

Naupadu Narasimhamurti Patnaick and others .. *Petitioners.**

Criminal Procedure Code (V of 1898), section 4 (1) (r)—Pleader—Unauthorised person excluded by first part of definition—Cannot claim protection under second part—District Magistrate's administrative order directing certain unauthorised persons should not be allowed to practice in a Court—Not open to revision by High Court.

The District Magistrate of Vizagapatam passed an order directing the Taluk Magistrate and the Sharistadar Magistrate of Patapatnam not to allow certain persons (enrolled in the Province of Orissa and practising in Parlakimidi close to Patapatnam) to practice in their Courts. The District Magistrate observed that they should enrol themselves under the Madras High Court if they wished to practice in the District of Vizagapatam. On revision,

Held, (1) a person cannot claim protection under the second part of the definition of " pleader " in section 4 (1) (*r*) of the Criminal Procedure Code when he is expressly excluded by the first part of the definition under which an advocate, vakil or attorney of a High Court must be so authorised. (2) The order of the District Magistrate being only administrative is not subject to revision by the High Court.

Petition under sections 435 and 439 of the Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of the District Magistrate of Vizagapatam, dated 5th May, 1942, and made in M.D. Dis. No. 679 of 1942.

Y. Suryanarayana for Petitioners.

K. Venkataraghavachari for the Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—The order of the District Magistrate of Vizagapatam which the petitioners now seek to revise was one passed in the exercise of his administrative magisterial functions directing the Taluk Magistrate and the Sharistadar Magistrate of Patapatnam not to allow certain unauthorised persons to practise in their Courts. These four persons are legal practitioners enrolled in the Province of Orissa, three of them apparently being pleaders and the fourth a mukhtar. They practise in Parlakimidi which is in Orissa but is close to Patapatnam, the nearest town in British India. The District Magistrate observed that they should enrol themselves under the Madras High Court if they wished to practise in the district of Vizagapatam and he directed the two Magistrates mentioned not to allow them to practise in their Courts.

On their behalf it has been urged that under section 340 (1) of the Criminal Procedure Code the petitioners are entitled to appear with the permission of the Magistrate in any particular case. A " pleader " is defined in section 4 (1) (*r*) of the Code, " a pleader or a mukhtar authorised under any law for the time being in force to practise in such Court, and includes (1) an advocate, a vakil and an attorney of a High Court, so authorised and (2) any other person appointed with the permission of the Court to act in such proceeding." It is argued that although the petitioners are not authorised under any law to practise in the Madras Courts, they nevertheless can come in under the second part of the definition. I am unable to see how the three pleaders can claim protection under the second part of the definition when they are expressly excluded by the first part of the definition, under which an advocate, vakil or attorney of a High Court must be so authorised. Therefore if the petitioners claim to be entitled to practise as vakils of a High Court, they must show that they are authorised to do so. It is conceded that they are not so authorised as their sanads entitle them to practise only in the Orissa Courts. The fourth petitioner is only a mukhtar and he claims to come in under the second part of the definition and the only question which remains is whether his exclusion by the District Magistrate is illegal or irregular. The learned Public Prosecutor raises the objection that the order, being only an administrative order, is not subject to revision under sections 435 and 439, Criminal Procedure Code. He relies on the decision in the case of *Chinnaswami Iyer*[1]. This related to a general order issued by a

*Crl. R. C. No. 468 of 1942. (Crl. R. P. No. 451 of 1942). 18th September, 1942.

1. (1909) 19 M.L.J. 566.

District Magistrate prohibiting the appearance of uncertified pleaders in the criminal Courts of the district and it was held when the proceedings were taken up by one of the uncertified pleaders in revision that the matter was not one for judicial adjudication and that if he was adversely affected by an order of a Sub-Magistrate refusing to accept his appearance, an appropriate application might be made. The learned advocate for the petitioners, arguing contra, relies on the case of *Ranga Rao*[1]. That case related to a general order passed by a District Magistrate prohibiting uncertified pleaders from appearing and practising in cases before him and it was held that the order went beyond what was permissible and that it was for the District Magistrate to exercise his discretion in each particular case in which the uncertificated pleader wished to appear. Another case relied on for the petitioners is that of *Nagaswami Iyer*[2], in which it was held that the District Magistrate had no authority to direct the Subordinate Magistrates to grant permission to a private pleader to practise in all cases in the future. The question of allowing private pleaders to appear in Magistrates' Courts is dealt with in rules 80 and 81 in Chapter IV of the Criminal Rules of Practice where, after referring to the discretion conferred by section 340 (1) read with the definition in section 4 (1) (*r*) of the Code of Criminal Procedure, the following direction was issued,

> " Having regard to the large number of qualified practitioners now available in every part of the Presidency, the discretion to permit ' private pleaders ' to appear and argue cases should be exercised as sparingly as possible, and when such permission is granted the reasons for granting it must be recorded in writing. In general no person who is not a qualified legal practitioner should be permitted to act except to prevent a possible miscarriage of justice :
>
> Provided always that these instructions shall not apply to persons who prior to 18th October, 1899, were practising as private pleaders."

So far as Patapatnam is concerned, there is no dearth of properly qualified practitioners. There are actually four pleaders and one advocate and it was on their representation that the District Magistrate issued the order now complained of. Hence there can be no possible grounds for allowing these unqualified or unauthorised persons to appear and practise in the Patapatnam Courts. Although the decision in *Ranga Rao's case*[1] supports the argument that the order of the District Magistrate is general in character and goes too far, the decision in *Chinnaswami Iyer's case*[3] was by a Bench in the following year and I think it is to be accepted in preference to the earlier decision by a single Judge. It follows therefore that the fourth petitioner can have no grievance against this administrative order.

On the merits, apart from whether the matter is one for judicial adjudication it must be conceded that the fourth petitioner has got no case whatever. Even if it be admitted for the purposes of argument that the order of the District Magistrate might in 1907 have been considered as going beyond the needs of the case, there can be no real ground on which the fourth petitioner can claim an exemption in his favour in 1942, when properly qualified and duly authorised legal practitioners are so widely and easily available. For these reasons the petition is ordered to be dismissed.

K.S. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Erasi Subba Reddi .. *Appellant.**

Indian Penal Code (XLV of 1860), sections 149 and 326—Rioting with deadly weapons causing grievous hurt—Spontaneous fight—Self-defence if can be pleaded.

Where there is a spontaneous fight between two parties, each individual is responsible for the injuries he causes himself and for the probable consequences of the pursuit by his party of their common object. He cannot plead that because he might at any moment be struck by some member of the other party his own blows were given in self-defence.

Appeal against the order of the Court of Session of the Kurnool division in C. C. No. 51 of 1941.

---

1. (1908) 4 M.L.T. 91.
2. (1922) 31 M.L.T. 458.
3. (1909) 19 M.L.J. 566.

*Crl. App. No. 827 of 1941. 7th April, 1942.

K. S. Jayarama Aiyar for *C. K. Venkatanarasimham* and *P. Ramanatha Sastri* for Appellant.

N. Somasundaram for the Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court delivered the following

JUDGMENT.—Six persons were charged before the Sessions Judge of Kurnool of rioting armed with deadly weapons, of murder, either because they killed a man themselves, or constructively by virtue of section 149, Indian Penal Code, and of offences punishable under section 323, Indian Penal Code. All the accused were acquitted of all the charges, with the solitary exception that the appellant, who was the fourth accused in the Sessions Court, was found guilty under section 326 of causing the fatal injury on the deceased person. He was sentenced to three years' rigorous imprisonment.

A number of persons of the prosecution party and the accused gathered to fight against one another and both parties sustained casualties. P. Ws. 3 to 6, the principal members of the party of the deceased asserted that the accused were entirely the aggressors. P. Ws. 7 to 9 belonged to neither party and appeared casually at the scene. Their account of what happened differed considerably from that of P. Ws. 3 to 6, in that they deposed that the first accused passed by the house of P. W. 3 and said to him, "Last evening you challenged me to go past your house for water. Now I have come," thus inviting P. W. 3 to attempt to try to prevent him from taking water. Not unnaturally P. W. 3 accepted the challenge. He was joined by P. Ws. 4 to 6, and the first accused was joined by accused 2 to 6. After an exchange of strong abuse, the deceased man stooped down to pick a stone, whereupon the fourth accused threw a stone at the head of the deceased and caused fatal injuries. The second accused then struck the deceased on the right arm with a stick which caused the deceased man to fall down. The other accused thereafter began to throw stones on the prosecution party and eventually succeeded in driving them from the field of battle.

The learned Sessions Judge disbelieved the evidence of P. Ws. 3-6 and based his conviction of the fourth accused exclusively on the evidence of P. Ws. 7 to 9. P. Ws. 7 to 9 are not perfect witnesses. Their evidence can be criticised; but I agree with the learned Sessions Judge that the value of their evidence lies in the moderation with which it is given. They did not attempt to support the whole of the prosecution story. They give an account of the affair which throws the blame fairly equally on the two sides; and the fact that they agree with one another affords very strong corroboration of their story, in that there is no reason why any one of these three witnesses should desire to support the other two. The learned Sessions Judge also thinks their evidence agrees with the story given by the accused 1 to 4 themselves, though naturally these accused are not willing to throw any responsibility upon themselves. The learned Sessions Judge therefore came to the not unreasonable conclusion that the party of the accused and the party of P. Ws. 3 to 6 and the deceased indulged in a spontaneous fight in which each person was responsible for the injuries that he caused.

The judgment of the learned Sessions Judge has been attacked primarily because of his finding that the prosecution story that the fifth and sixth accused had participated in the attack on the deceased and P. Ws. 3 to 6 had been proved to be false. It was therefore argued that if P. Ws. 7 to 9 had falsely implicated the fifth and the sixth accused, their evidence ought to be viewed with so much suspicion that it could not be accepted. I do not however feel the same certainty as the learned Sessions Judge that the fifth and sixth accused were not present. The learned Sessions Judge gives no reason at all for finding that the fifth accused was not present, except that he says,

> "it is significant that P. W. 10 who has been given up by the prosecution as hostile has been stating from the very beginning that accused 5 and 6 were not present and that all P. Ws. 7 and 9 allege is that they were present in the crowd which gathered after the occurrence had started."

I do not see why the evidence of P. W. 10 on this point is significant or why the evidence of P. Ws. 7 to 9 that the fifth accused was present should not be believed

merely because P. W. 10 did not see him there, especially when the learned Sessions Judge presumably considered that the Public Prosecutor was justified in treating P. W. 10 as hostile. There is more reason for doubting whether the sixth accused was present, in that his denial has the support of the local doctor, who says that the sixth accused was not able to move about on the day of offence because he had a fractured rib and high fever. I see no reason to doubt that it is true that the doctor was treating the sixth accused privately between the 23rd April and 7th May, the day on which the offence took place; but all we find in the register is that on the 23rd he had injuries and that he attended the dispensary every day between that day and the 7th May except on two days. The entries in the register for the subsequent days do not indicate the nature of the treatment or the state of the patient. Even if one is prepared to accept the general evidence of the doctor, I think he goes too far in saying that he remembers that this accused came to his dispensary between 10 and 11 A.M. on the day of occurrence, just at the time that this offence is said to have taken place, that he then had a high temperature and that he was then brought to him in a bandy. It is true that this evidence may entitle the sixth accused to the benefit of the doubt; but I certainly do not agree that the learned Sessions Judge was right in saying in paragraph 8 of his judgment,

> "it has been conclusively established that accused 5 and 6 could not have been present and that they had been falsely implicated"

and later,

> "these facts establish beyond doubt that he the sixth accused could not have been present at the scene of occurrence at about 11 A.M."

Many of the witnesses implicate the sixth accused only in a very general way, as the learned Sessions Judge has noted with regard to P. Ws. 7 to 9. Even though the sixth accused did not throw stones he may well have been present.

I therefore find even less reason than the learned Sessions Judge did for disbelieving the evidence of P. Ws. 7 to 9. It is next argued that the act of the fourth accused did not amount to causing grievous hurt with a dangerous weapon. That the weapon used was a dangerous one is proved by the fact that it actually caused the death of the deceased, and there is no reason to think that there was anything peculiar about the skull of the deceased that rendered it especially liable to fracture. There were two long fissured fractures crossing one another, and so the stone thrown at the head of the deceased presumably struck him roughly at the intersection of these two fissured fractures. The nature of the injury on the head of the deceased affords corroboration to the story of P. Ws. 7 to 9 as to the circumstances under which the fourth accused threw the stone. They say that he was bending down to pick up a stone when the fourth accused threw it. The position of the injury is more or less where the stone was most likely to hit the deceased when he was so stooping down.

It is finally argued that the accused was exercising the right of self-defence, in that the deceased was stooping to pick up a stone to throw at him or at some body else in his party. I agree that there was more reason for finding that the fourth accused acted in self-defence than for finding the second accused acted in self-defence; for the second accused struck his blow when the deceased had had his skull fractured and was not in a position to take any further part in the rioting. But where it is clear from the evidence that the two parties were spoiling for a fight and that each person began to pick up stones and throw at the other party, then the accused party cannot plead that because the prosecution witnesses were also intent on beating them, every blow they gave was given in self-defence. Where there is a spontaneous fight between two parties, each individual is responsible for the injuries he causes himself and for the probable consequences of the pursuit by his party of their common object. He cannot plead that because he might at any moment be struck by some member of the other party his own blows were given in self-defence,

The conviction is therefore right. In view of the serious consequences of this offence, the sentence of three years' rigorous imprisonment is not excessive. The appeal is dismissed.

K.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ABDUR RAHMAN.

Sri Alluri Satyanarayana and another .. *Appellants** (*L. Rs: of Defendants*)

v.

Ramineedi Rayalamma and another .. *Respondents* (*Plaintiffs 2 and 3*).

Madras Estates Land Act (I of 1908), sections 111, 112, 115 and 116 (before amendment)—Onus of proof showing that an application was made within the 30 days prescribed by section 115—Sale held in the absence of such application—Suit by ryot for possession—Limitation Act (IX of 1908), Articles 12 (d) or 14—Not applicable.

The proprietor of an estate who had a notice issued in 1925 under section 112 of the Estates Land Act for bringing a portion of the lands held by a ryot to sale in realisation of his dues did not make an application within thirty days of the disposal of the ryot's suit contesting the right to sell the property and he made an application only in 1930 (almost two years after the appellate Court had confirmed the decree of dismissal passed in the ryot's suit) and a sale was duly held.

On the question of the validity of the sale and the right of X, a purchaser of the ryot's interest in execution of a mortgage decree against him, to possession of the land,

Held, (1) It is the duty of the landholder who relies on the validity of the rent sale to show that an application was made within the period prescribed under section 115 of the Estates Land Act and it is only when the application is found to have been made that jurisdiction would be conferred on the Collector to have proceeded with the sale which he had concluded as the landlord's agent. The onus is not on the other side to show that the terms of the statute had been complied with.

(2) If the jurisdiction of the Collector to appoint an officer to conduct the sale was not invoked by or on behalf of the landholder as required by section 115, the subsequent proceedings taken by the Collector could be of no legal value and a sale held in consequence is void.

Accordingly neither Article 12 (*d*) nor Article 14 of the Limitation Act would have any application to *X's* suit for possession. The sale under the Estates Land Act is not in pursuance of a decree or order of the Collector or other officer of Revenue, but it is the landholder who is authorised under section 111 of the Act to sell the property and the rent sale is an act merely of an executive officer acting as the landlord's agent. As the order of the Collector in the rent sale was illegal it is not necessary for the plaintiff to bring a suit to set aside the rent sale and he would be entitled to wait until the sale was attempted to be enforced or enforced against him.

Appeal against the order of the District Court of East Godavari at Rajahmundry dated 15th July, 1941 and made in A. S. No. 86 of 1939, preferred against the order of the Court of the Subordinate Judge of Amalapuram, dated 23rd March, 1939, and made in O. S. No. 14 of 1938.

K. Bhimasankaram for Appellants.

S. Kothandarama Nainar for Respondents.

The Court delivered the following

JUDGMENT.—The only question that arises for decision in this appeal is one of limitation. The suit out of which it arises was instituted originally for a declaration that the sale of 25 acres of land which forms portion of patta No. 74 was illegal and invalid. But as during the pendency of the suit, the defendant had succeeded in getting possession of the property, the suit was allowed to be converted into one for possession. The contention raised on behalf of the defence was that the suit was barred by Article 12 (*d*) or Article 14 of the Indian Limitation Act. The trial Court held that the suit was barred under Article 14 of the Limitation Act. This view did not find favour with the learned District Judge of East Godavari on appeal who held that the suit was not barred by either of these articles and remanded the case for fresh disposal on the other issues that had not been determined by the trial Court. The defendant has consequently come up to this Court in second appeal.

The defendant is the proprietor of Surasaniyanam estate. A portion of this estate (150 acres in area) was occupied by Rayappa Pantulu as a ryot. He appears

*A. A. O. No. 719 of 1941. 23rd November, 1942.

to have committed default in regard to the payment of rent for fasli 1333 (1923) in respect of 25 acres out of that area. A notice was issued in 1925 under section 112 of the Estates Land Act by the defendant for bringing these 25 acres to sale in realisation of his dues. Rayappa Pantulu contested the defendant's right to sell the property under section 112 of the Estates Land Act and brought a suit (R. S. No. 26 of 1925) for that purpose in the Court of the Sub-Collector of Rajahmundry. This suit was dismissed on the 28th August, 1926, and an appeal from that decree was also dismissed. The trial Court stated in its judgment that it was dismissed on the 17th March, 1927. The appellate Court only referred to the month of March, 1927, in which the appeal was dismissed but did not mention the date. There is no doubt that it was dismissed before the 31st March, 1927, as a revised decree. (Ex. XIX) was passed on the 31st March, 1927. No objection was taken to the statement of fact by the trial Court that the appeal was dismissed on the 17th March, 1927 and in the absence of any objection on behalf of the appellants, I am inclined to accept that date as the one on which the appeal was dismissed by the appellate Court.

It appears that Rayappa Pantulu had mortgaged the 150 acres in Patta No. 74 and that property was sold in execution of the mortgage decree. It was purchased by the plaintiff's agent on behalf of the plaintiff on the 8th January, 1929, and the sale was confirmed on the 24th July of that year.

The defendant who had a notice issued under section 112 of the Estates Land Act in 1925 did not make an application within thirty days of the date of the disposal of either the suit R. S. No. 26 of 1925 or of its appeal (whether the term 'disposal' is taken to mean the disposal by the first Court or by the appellate Court although I am, as at present advised, inclined to the view that it means final disposal by whichever Court it may be) as required by section 115, sub-clause (2) of the Estates Land Act. But he made an application (Ex. C) on the 9th January, 1930, *i.e.*, almost two years and nine months after the appellate Court had confirmed the decree of dismissal passed in Rayappa Pantulu's suit. Learned counsel for the appellants relied on another application shown in the column of remarks to have been made by his clients on the 7th of March, 1927. A mere allegation by the appellant in his application Ex. C that he had made a prior application earlier would not by itself be evidence of the fact that such an application was given by him. It is a self-serving statement and would not be relevant for that purpose. But even if it is, it could be of no avail to him as this was not made until about six months after the decision of the trial Court and ten months before the decision of the appellate Court and in neither case within 30 days of their disposal as required by law. Learned counsel for the appellant urged that it was the duty of the plaintiff to establish that no sale application had been filed by the defendant within the time prescribed by law, but this is not correct. It is obviously the duty of the landholder who relies on the validity of the sale to show that an application was made within the period prescribed under section 115 of the Estates Land Act and it is only when the application is found to have been made that jurisdiction would be found to have been conferred on the Collector to have proceeded with the sale which he had conducted as the landholder's agent. If the landholder wishes to contend in a Court that the sale had been held at his instance after he had fully complied with the requirements of law, the onus would apparently lie on him and not on the other side to show that the terms of the statute had been complied with. In the absence of any other allegation—not to say of proof—the only conclusion which one can reach is that no application was made on behalf of the defendant within thirty days of the disposal of the suit or of its appeal, if one was preferred—as happened to be the case here. If no such application is proved to have been made the Collector who was really carrying out the will of the landholder, as mentioned in section 111 of the Estates Land Act, must be found to have had no jurisdiction to appoint an officer to conduct the sale. It may be borne in mind that section 116 of the Estates Land Act which is applicable to the present case was different and must not be confused with the present section 116 of that Act—a mistake which

was committed by the trial Court. If the jurisdiction of the Collector to appoint an officer to conduct the sale was not invoked by or on behalf of the defendant as required by section 115 of the Estates Land Act, the subsequent proceedings taken by the Collector could be of no legal value and a sale held in consequence must be found to be void. If that be so, neither of the articles relied on by the defendant would have any application. Moreover, the sale under the Estates Land Act is not in pursuance of a decree or order of a Collector or other officer of Revenue, but it is the landholder who is authorised under section 111 of the Estates Land Act to sell the property or any part thereof. It is unnecessary for me to discuss this point at any length, as I find that two learned Judges of this Court have taken the same view (vide *Subbayya* v. *Kristayya*[1] and *Kootoorlinga Pillai* v. *Sennappa Reddiar*[2]). I find myself in agreement with the view expressed by them. Learned counsel for the appellant drew my attention to a decision of a Division Bench in *Kamalammal* v. *Chockalinga Asari*[3], but that decision has been distinguished—and if I may say so with respect—rightly by Ramesam, J., in *Kootoorlingam Pillai* v. *Sennappa Reddiar*[2]. Moreover the suit, with which the Division Bench was dealing, was to set aside a revenue sale which is entirely different from a sale by the landholder under the Estates Land Act. Article 12 has therefore no application. Nor would Article 14 be applicable to the case, although I must admit that the reasons given by the lower appellate Court to hold that article to be inapplicable are not correct. The plaintiff who had purchased the right, title and interest of the judgment-debtor in the property could not be held to be an entire stranger. Nor would the question that the suit is for possession be by itself sufficient. If it was necessary for the plaintiff to get the decree, order or any other act of a Government officer referred to in Article 12 (*b*) or Article 14 of the Limitation Act set aside before he could get a decree for possession, it would be essential for him to get it set aside within the time referred to in these Articles before a decree for possession can be passed in his favour. But if the order of the officer concerned is illegal, as I find it to be the case here, it would not be necessary for the plaintiff to bring a suit to set aside the sale and he would be entitled to wait until the sale was either attempted to be enforced or enforced against him. This was held by their Lordships of the Privy Council in *Lakshmana Rao* v. *Shrinivas*[4]. Moreover the act referred to in Article 14 of the Indian Limitation Act must be, as held in *Shivaji Yesji Charan* v. *Collector of Ratnagiri*[5] and approved of in *Rameswaram Devasthanam* v. *Secretary of State*[6] of a *quasi* judicial nature and not merely that of an executive officer who is, in carrying out the will of the landholder, acting as his agent and is permitting his department to be used for the purpose of conducting the sale. In either view of the case Article 14 would have no application.

The appeal accordingly fails and is dismissed with costs.

Leave refused.

K.S. *Appeal dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE WADSWORTH, MR. JUSTICE LAKSHMANA RAO, MR. JUSTICE PATANJALI SASTRI AND MR. JUSTICE HAPPELL.

The Tirumalai Tirupati Devasthanams Committee, by its Commissioner .. *Appellant** (*Plaintiff*)

v.

Udiavar Krishnayya Shanbhaga and others .. *Respondents* (*Defendants*).

Civil Procedure Code (V of 1908), section 92—Suit by general trustees of a temple against the trustees of a fund contributed by devotees for accounts and recovery of amounts to be ascertained on such accounts—Does not require the sanction of the Advocate-General for its institution.

---

1. (1926) 52 M.L.J. 390.
2. (1931) 61 M.L.J. 203.
3. (1923) 45 M.L.J. 840.
4. A.I.R. 1927 P.C. 217.
5. (1886) I.L.R. 11 Bom. 429.
6. A.I.R. 1927 Mad. 1167.

*Appeal No. 172 of 1941. 19th February, 1943.

A suit by the general trustees of a temple against the trustee of a fund contributed by devotees for being made over to that temple, praying for a decree directing accounts and inquiries and for the recovery of the amounts to be ascertained on such accounts being taken does not fall within section 92 of the Civil Procedure Code and does not require the sanction of the Advocate-General for its institution. In deciding whether a suit falls within section 92 the Court must go beyond the reliefs sought and have regard to the capacity in which the plaintiffs are suing and to the purpose for which the suit is brought.

Janki Bai v. *Tiruchitrambala Vinayakar*, (1935) 69 M.L.J. 291 : I.L.R. 58 Mad. 988 (F.B.) criticised. *Shunmukham Chetti* v. *Govinda Chetti*, I.L.R. (1938) Mad. 39, approved.

Appeal against the decree of the Court of the Subordinate Judge of South Kanara in O. S. No. 10 of 1937.

V. Govindarajachari and *B. V. Ramanarasu* for Appellant.

S. Panchapagesa Sastri and *M. L. Nayak* for Respondents.

[In pursuance of an Order of Reference by *Krishnaswami Ayyangar* and *Kunhi Raman, JJ.*, dated 22nd January, 1943, this appeal coming on for hearing, the Court expressed the following]

OPINION : *The Chief Justice.*—This reference arises out of an appeal to this Court from a decree passed by the Subordinate Judge of South Kanara, dismissing a suit instituted by the Tirumalai-Tirupathi Devasthanams Committee against the trustees of the Sri Venkataramana Devara Bhandaram, a temple situate at Moolki within the jurisdiction of the Subordinate Court. The Tirupati temple, which lies a little over a hundred miles from Madras, is one of the famous temples of South India and is held in the greatest veneration by all Hindus. From time immemorial the trustees of the Moolki temple have maintained therein a box for the reception of offerings, usually of money or jewels, which devotees wish to make to the deity of the Tirupati temple. The duties of the respondents in this connection are to see that the collection box is properly kept, from time to time to count the offerings placed therein and then to hold them in safe custody until such time as they can conveniently be delivered to the trustees of the Tirupati temple. In days gone by, a deputation of devout Hindus was sent from Moolki to Tirupati for this purpose. The members of the deputation made the journey from Moolki to Tirupati as best they could, on foot or in carts. For many years a deputation has not been sent and the offerings have remained with the trustees of the Moolki temple. The suit was to compel the defendants to render an account of the offerings made since the last remittance and to deliver them to the plaintiffs. With regard to gifts in kind the plaintiffs asked for delivery of the articles themselves or their value. In the trial Court the case proceeded on the basis that the defendants are trustees of the offerings and the learned Judges who have made this reference have expressly held that they are trustees.

The Subordinate Judge considered that the suit fell within section 92 of the Civil Procedure Code of 1908, and that as the sanction of the Advocate-General to its institution had not been obtained it could not be maintained. If the judgment of this Court in *Janaki Bai* v. *Tiruchitrambala Vinayakar*[1] is to be deemed to embody a correct statement of the law, the suit would require the sanction of the Advocate-General. Stated broadly, the decision there was that in deciding whether the sanction of the Advocate-General was required, the Court had to look at the reliefs which were sought, without reference to the character in which the plaintiffs sued. This decision was criticised by Varadachariar, J., in *Shanmukham Chetti* v. *Govinda Chetti*[2], and the learned Judges in making this reference have indicated that in their opinion the criticism is well founded. Consequently, they have referred for the decision of a Full Bench the following question,

"whether a suit by the general trustee of a public temple against the trustee of a fund contributed by devotees, for being made over to that temple, praying for a decree directing accounts and inquiries and for the recovery of the amounts to be ascertained on such accounts being taken, falls within section 92 of the Civil Procedure Code and requires the sanction of the Advocate-General for its institution."

---

1. (1935) 69 M.L.J. 291 : I.L.R. 58 Mad. 988 (F.B.).
2. I.L.R. (1938) Mad. 39.

The effect of section 92 has often been debated and the reported decisions are not in harmony. To discuss them all would be a most laborious task and would serve no useful purpose. The cases to which we propose to refer sufficiently disclose the conflict and therefore are ample for the purpose of forming our own conclusions. We will take them in the order of date, but before embarking on the discussion it will be useful to set out the provisions of section 92 and to indicate its relation to the corresponding provisions of earlier Codes. The section now reads as follows:

"(1) In the case of any alleged breach of any express or constructive trust created for public purposes of a chartitable or religious nature, or where the direction of the Court is deemed necessary for the administration of any such trust, the Advocate-General, or two or more persons having an interest in the trust and having obtained the consent in writing of the Advocate-General, may institute a suit, whether contentious or not, in the principal Civil Court of original jurisdiction or in any other Court empowered in that behalf by the Provincial Government within the local limits of whose jurisdiction the whole or any part of the subject-matter of the trust is situate, to obtain a decree—

(a) removing any trustees;
(b) appointing a new trustee;
(c) vesting any property in a trustee;
(d) directing accounts and inquiries;
(e) declaring what proportion of the trust property or of the interest therein shall be allocated to any particular object of the trust;
(f) authorising the whole or any part of the trust property to be let, sold, mortgaged or exchanged;
(g) settling a scheme; or
(h) granting such further or other relief as the nature of the case may require.

(2) Save as provided by the Religious Endowments Act, 1863, no suit claiming any of the reliefs specified in sub-section (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that sub-section."

There was no corresponding provision in the Code of 1859. Section 539 of the Code of 1877 was substantially the same as sub-section (1) of section 92 of the present Code and it was continued in section 539 of the Code of 1882. The Codes of 1877 and 1882 did not, however, embody the provision of sub-section (2). The insertion of sub-section (2) makes the previous sanction of the Advocate-General imperative for the maintenance of a suit which falls within the purview of sub-section (1).

In *Nellayyappa Pillai* v. *Thangamma Nachiar*[1], a Bench of this Court held that the introduction of section 539 of the Code of 1877 did not mean that public trustees were required to obtain the sanction of the Advocate-General in a suit to enforce the obligations of special trustees in whose hands were temple funds and to obtain all appropriate reliefs for the protection of the interests of the temple. There, the trustee of the temple sued to recover from the legal representatives of the trustee of a fund constituted for special purposes in connection with temple worship money which had been misappropriated by him and to obtain the appointment of another person in his place. The plaintiff had obtained leave to sue under section 30 of the Code of 1882, which corresponds to Order 1, rule 8, of the present Code, but he did not obtain the sanction of the Advocate-General under section 539. The Court accepted the argument that section 539 was intended to apply to persons who, before its enactment had, or were believed to have, no right to take proceedings for the purposes mentioned in the section and in their case the limitation requiring previous sanction of the suit was one that was necessary to prevent an abuse of the powers conferred. We agree with the opinion expressed in the judgment that section 539 of the Code of 1882 did not take away rights in trustees then existing. The question was exhaustively examined by Woodroffe, J., in *Budree Das Mukin* v. *Chooni Lal Johurry*[2], where he held that when persons sued, not to establish the general rights of the public, but complained of a particular infringement of individual rights, the suit was not within the section and need not be brought under it.

In *Saminatha Pillai* v. *Sundaresa Pillai*[3], a Full Bench of this Court consisting of Ayling, Coutts-Trotter and Kumaraswami Sastriar, JJ., considered that section 92

1. (1897) 8 M.L.J. 119 : I.L.R. 21 Mad. 406.
2. (1906) I.L.R. 33 Cal. 789.
3. (1920) 14 L.W. 238 (F.B.).

of the present Code required the sanction of the Advocate-General in a case where the general trustee of a temple sued a *kattalaidar* to recover the income of the special trust received by him and not paid to the temple. The appeal was first heard by Wallis, C.J., and Krishnan, J., and as they differed, it was placed for decision before a Bench of three Judges in accordance with the practice then ruling. Wallis, C.J., thought that where there are several trustees of different properties vested in them respectively for the performance of various services in the temple, the main or general trustee of the temple has no right to sue otherwise than under section 92 for the failure of one of the other trustees to perform his trust, and the decision of the Full Bench was in accordance with this decision. The learned Judges who composed the Full Bench considered that as a result of the insertion of sub-section (2), *Nellayyappa Pillai* v. *Thangamma Nachiar*[1] no longer applied. While it may be accepted that the general trustee of a temple may not sue a special trustee except under the provisions of section 92, when the general trustee is seeking relief, which, if granted, will lead to a change in the management of the special trust, it is quite a different matter when the general trustee seeks to recover for the benefit of the temple monies in the hands of the special trustee, which the special trustee is in duty bound to pay over to the general trustee.

In *Appanna Poricha* v. *Narasinga Poricha*[2], a Full Bench of five Judges of this Court of which Ayling and Kumaraswami Sastriar, JJ., were again members, held that a suit by a trustee of a public trust against a co-trustee for accounts does not fall within section 92. Ayling, J., who was then officiating as the Chief Justice, distinguished the decision in *Saminatha Pillai* v. *Sundaresa Pillai*[3] on the ground that that was a case in which a subordinate trustee was sued by a general trustee who as representing the general trust was really a beneficiary under the subordinate trust, and was seeking as such, to enforce fulfilment of the latter. Kumaraswami Sastriar, J., expressed the opinion that the words "directing accounts and inquiries" in clause 1 (*d*) of section 92 should be confined to suits by the Advocate-General, or by two or more persons with his consent, against all the trustees for an account of their management, and not one or more trustees against the others, as each trustee has a right to call upon the other to account to him for trust funds which he has received, even though the other trustee commits no breach of trust.

We will now turn to the decision of the Privy Council in *Abdur Rahim* v. *Mohamed Barkat Ali*[4], where their Lordships rejected the argument that all suits founded upon a breach of trust for public purposes of a charitable or religious nature, irrespective of the relief sought, must be brought in accordance with the provisions of section 92. In delivering the judgment of the Board, Lord Sinha said :

"The short answer to that argument is that the Legislature has not so enacted. If it had so intended, it would have said so in express words, whereas it said, on the contrary, that only suits claiming any of the reliefs specified in sub-section (1) shall be instituted in conformity with the provisions of section 92, sub-section (1)."

In that case, the suit was instituted by the appellants for a declaration that certain properties belonged to a waqf connected with a mosque and that they were not bound by a compromise decree passed in 1910. In the alternative they asked for the cancellation of the decree. Neither the relief asked for in the first place nor the relief sought in the alternative fell within sub-section (1) of section 92 and in the circumstances the Judicial Committee held that sanction was not requisite. Their Lordships were not called upon to decide whether the sanction of the Advocate-General is required when trustees are suing to enforce rights which they possess as trustees and the reliefs sought, when viewed in the abstract, fall within those mentioned in sub-section (1) of section 92.

This brings us to the consideration of the case which has really given rise to this reference, *Janaki Bai* v. *Tiruchitrambala Vinayakar*[5]. There, the defendant

---

1. (1897) 8 M.L.J. 119 : I.L.R. 21 Mad. 406.
2. (1921) 41 M.L.J. 608 : I.L.R. 45 Mad. 113 (F.B.).
3. (1920) 14 L.W. 238 (F.B.).
4. (1927) 54 M.L.J. 609 : L.R. 55 I.A. 96 I.L.R. 55 Cal. 519 (P.C.).
5. (1935) 69 M.L.J. 291 : I.L.R. 58 Mad. 988 (F.B.).

was sued as the trustee of a fund established for meeting the expenses of public worship and other duties, including the carrying out of repairs to the temple. The plaintiff was the idol represented by the *kariasthan*. The defendant had refused to pay over to the plaintiff the money which had been collected for these expenses. It was held that the sanction of the Advocate-General was necessary to the institution of the suit. The passage just quoted from the judgment delivered by Lord Sinha in *Abdur Rahim* v. *Mohamed Barkat Ali*[1] was made the basis for holding that the question whether a suit falls within section 92 depends, not upon the character in which the plaintiff sues, but upon the nature of the relief sought.

This decision was strongly criticised by Varadachariar, J., in *Shanmukham Chetti* v. *Govinda Chetti*[2]. There certain trustees of a Hindu temple brought a suit against their co-trustees for an account, and it was said that the judgment in *Appanna Poricha* v. *Narasinga Poricha*[3] had been set at nought by the judgment of the Privy Council in *Abdur Rahim* v. *Mohamed Barkat Ali*[1] and by this Court in *Janaki Bai* v. *Tiruchitrambala Vinayakar*[4]. In *Shanmukham Chetti* v. *Govinda Chetti*[2], I was sitting with Varadachariar, J., and I expressed the opinion that section 92 deals merely with the procedure to be adopted in a representative suit for relief in respect of a public trust; that to come within the section, there must be a breach of trust or the necessity for the direction of the Court with regard to the administration of a trust; that there must be at least two plaintiffs (unless, of course, the Advocate-General himself sues) and the Advocate-General must give his sanction to the institution of the suit; and that in enacting section 92 the Legislature never intended to take away the right of a trustee to launch a suit for an account against a co-trustee. Varadachariar, J., agreed with this opinion and went on to express dissent from the decision in *Janaki Bai* v. *Tiruchitrambala Vinayaka*[4] that the question whether a suit falls within section 92 depends, not upon the character of the plaintiff's suit, but on the nature of the relief sought. Varadachariar, J., also agreed with the statement in Mulla's Civil Procedure Code, page 309, 10th edition, that it is not every suit claiming any of the reliefs specified in sub-section (1) of section 92 that should be brought with the consent of the Advocate-General, but those suits only which, besides claiming any of those reliefs, are brought by individuals as representatives of the general public.

After hearing the arguments of learned counsel in the present case we can see no reason for disagreeing with anything said in *Shanmukham Chetti* v. *Govinda Chetti*[2]. On the other hand, we find ourselves in full agreement with the opinion of Varadachariar, J., that in deciding whether a suit falls within section 92, the Court must go beyond the reliefs and have regard to the capacity in which the plaintiffs are suing and to the purpose for which the suit is brought. The judgment of the Privy Council in *Abdur Rahim* v. *Mohamed Barkat Ali*[1] lends no support for the opinion expressed by the Full Bench in *Janaki Bai* v. *Tiruchitrambala Vinayakar*[4].

The trustees of the Tirupati temple, *qua* trustees, have the right of recovering from the trustees of the temple at Moolki monies which those trustees have collected on behalf of the Tirupati temple, and this right is entirely independent of section 92. The respondents are in law bound to deliver to the plaintiffs the monies and offerings in kind obtained from the collection box referred to at the beginning of this judgment and it is the duty of the plaintiffs to enforce delivery. The plaintiffs are not seeking to control the manner of collection or the duties of the respondents which are peculiarly theirs. They are merely seeking to get from the respondents what the respondents hold on behalf of the plaintiffs. In these circumstances we consider that section 92 has no application here and we answer the reference in this sense.

The costs of this reference will be made costs in the appeal.

K.S. — *Reference answered.*

---

1. (1927) 54 M.L.J. 609 : L.R. 55 I.A. 96 : I.L.R. 55 Cal. 519 (P.C.).
2. I.L.R. (1938) Mad. 39.
3. (1921) 41 M.L.J. 608 : I.L.R. 45 Mad. 113 (F.B.).
4. (1935) 69 M.L.J. 291 : I.L.R. 58 Mad. 988 (F.B.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

Chennamangalath Manakkal Vasudevan Nambudripad .. *Appellant** (*Plaintiff*)

v.

Ambujakshi and others .. *Respondents* (*Defendants*).

Malabar Tenancy Act (XIV of 1930), section 15 (3)—Sub-tenant cannot claim benefit of section.

A sub-tenant under the Malabar Tenancy Act, 1929, cannot claim the benefit of the provisions of section 15 (3).

Where the seventh defendant in a suit for eviction and arrears of rent by the landlord (the plaintiff), was not a tenant directly under the plaintiff, and in bringing the suit the plaintiff did not sue as the landlord of the seventh defendant but only as the landlord of the defendants 1 to 6,

Held, that the defendants 1 to 6 were the only persons who owed the rent and they were the only persons who were entitled to take advantage of section 15 (3) and not the seventh defendant.

Appeal against the decree of the Court of the Subordinate Judge of South Malabar at Calicut in A. S. No. 68 of 1941, preferred against the decree of the Court of the District Munsiff of Chowghat in O. S. No. 241 of 1940.

K. P. Ramakrishna Aiyar for Appellant.

B. Pocker and *P. Kannan* for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—The plaintiff sued to evict his tenants, defendants 1 to 6, from the land in suit. The tenancy was an oral one and was from year to year. The relief was asked for because the tenants had failed to pay the rent due for several years. In addition to asking for a decree for eviction the plaintiff asked for a decree for a sum equivalent to the rent due for three years preceding the suit.

The tenants were members of a tarwad and before the suit was instituted they had separated. On separation, defendants 1, 3 and 6 sub-let a portion of the land in suit to the eighth defendant, who subsequently assigned his sub-tenancy to the seventh defendant. The suit was not defended and a decree directing the eviction of defendants 1 to 6 and the payment to the plaintiff of the three years' rent was passed. Notwithstanding that none of the defendants had resisted the suit the seventh defendant filed an appeal. At the hearing she said that she was prepared to pay the amount of the rent due and on this basis asked for the dismissal of the suit under the provisions of section 15 (3) of the Malabar Tenancy Act, 1929. The Subordinate Judge held that she was entitled to the benefit of section 15 (3) and accordingly allowed the appeal on the condition that she deposited the amount decreed by the trial Court. This appeal is from the decision of the Subordinate Judge. Two questions are said to arise, namely, (1) whether a sub-tenant can claim the benefit of the provisions of section 15 (3), and (2) whether an appellate Court can for the first time grant relief under that section when no deposit of rent was made in the trial Court.

Section 14 of the Act states that no suit for eviction of a cultivating verumpattamdar from his holding shall lie at the instance of his landlord except on the grounds set out in the section. There are seven grounds mentioned and the third is that the tenant has not paid within three months after the due date, the whole or any portion of the rent due in respect of the holding. Sub-section (3) of section 15 reads as follows :

> " In any suit in which eviction is claimed on the ground specified in clause (3) of section 14, if the tenant deposits in Court, for payment to the plaintiff in the suit, (*i*) the amount of rent due with interest thereon at the contract rate, if any; (*ii*) interest on the principal amount of the rent due at 12 per cent. per annum from the date of suit up to the date of deposit ; and (*iii*) the costs of the plaintiff up to that date, the Court shall dismiss the suit."

It is to be observed that section 14 (3) and section 15 (3) relate to a suit between the landlord and his tenant. If it is not a suit between the landlord and his tenant then sub-section (3) of section 15 does not come into operation. Clause (*o*) of sec-

*S. A. No. 389 of 1942. 28th January, 1943.

tion 3 defines "landlord" as a person under whom a tenant holds and to whom he is liable to pay rent or michavaram, and includes a jenmi. Clause (v) of this section defines "tenant" as a person who has paid or has agreed to pay rent, or other consideration, for his being allowed by another, to enjoy the land of the latter, and includes an intermediary, a kanomdar, a kuzhikanomdar and a verumpattamdar of any description. The word "landlord" in section 14 therefore means the person to whom the tenant is liable to pay rent.

The seventh defendant was never a tenant of the plaintiff and in bringing this suit the plaintiff did not sue as her landlord, but as the landlord of defendants 1 to 6. They were the persons who owed the rent and they were the persons who were entitled to take advantage of section 15 (3), but they did not wish to do so. Section 15 (3) does not empower the seventh defendant to deposit in Court the rent due to the plaintiff because she was not the tenant of the plaintiff. If it had been a suit instituted by defendants 1, 3 and 6, who were the landlords of the seventh defendant within the meaning of section 14 to recover from her the rent for the portion occupied by her as their tenant, she would have been able to avail herself of section 15 (3), but the suit was not by them, but by the landlord of defendants 1 to 6. The Subordinate Judge erred in holding that section 15 (3) applied in this case.

In this view it is not necessary to decide the second question referred to.

The appeal must be allowed with costs here and before the Subordinate Judge.

K.C. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUPPUSWAMI AYYAR.

Daggupati Nayudamma .. *Appellant**

v.

Sait Sivaraju Dharamchand Kottuvaru and another .. *Respondents.*

Practice—Attachment before judgment—Dismissal of suit—Subsequent restoration on review and decree—Effect on attachment.

An attachment before judgment can be availed of by a plaintiff decree-holder whose suit was originally dismissed by the trial Court but was decreed subsequently allowing a review petition filed by him. The attachment revived with the restoration of the suit and the purchasers of the property from the judgment-debtor subsequent to the passing of the decree after review cannot resist the decree-holder's right to proceed against the property.

Appeal against the decree of the Court of the Subordinate Judge of Tenali dated 25th March, 1940, and passed in A. S. No. 35 of 1939 preferred against the decree of the Court of the District Munsiff of Tenali in O. S. No. 314 of 1934.

V. Subramaniam for Appellant.

P. Satyanarayana Rao and *Y. G. Krishnamurthi* for Respondents.

The Court delivered the following

JUDGMENT.—The only question for consideration in these two appeals is whether the attachment before judgment effected in a suit can be availed of by a plaintiff decree-holder whose suit was originally dismissed by the trial Court but was decreed subsequently allowing a review petition filed by him.

The appellants in both these appeals are purchasers from the judgment-debtor in O. S. No. 37 of 1931 on the file of the Subordinate Judge's Court, Tenali. That was a suit on a promissory note executed by a lady. The properties in dispute in both these appeals were attached before judgment at the instance of the plaintiff. The suit was dismissed on the ground that the thumb impression in the document was not that of the defendant. The parties proceeded under the impression that the impression was that of the left thumb, but it was subsequently discovered that the impression was that of the right thumb ; a review application was filed and the review was allowed. After the review was allowed, evidence was led to show that the impression was that of the right thumb and a decree was passed. These two appellants have purchased subsequent to the passing of the decree after review the

*S. As. Nos. 354 and 355 of 1941. 10th November, 1942.

properties that were attached and their claim petitions filed in the proceedings to execute the decree passed after review were dismissed. They filed suits to set aside those summary orders and it is out of these suits these appeals arise. Their contention was that the attachment had terminated when the suit was dismissed and was not revived by the subsequent allowing of the review and cannot therefore be availed of in execution of the decree passed after the review was allowed. Both the Courts found against the appellants. Hence this second appeal.

In *Balaraju Chettiar* v. *Masilamony Pillai*[1], the question had to be considered with reference to a decree obtained on appeal reversing the decree of the first Court dismissing the suit. It was held that it was not necessary that an express order terminating the attachment should be passed and that the attachment automatically ceased on the termination of the suit and therefore cannot be availed of by the decree-holder in execution of the decree passed on appeal. At pages 350 and 351 stress is laid on the fact that the decree passed in the suit was a decree passed not by the trial Court but by the appellate Court and that the attachment was effected only for the benefit of the decree that might be passed by the trial Court. The same question had to be considered by a Full Bench of this Court in *Veerasami* v. *Ramanna*[2], but in that case the original decree was vacated by the dismissal of the suit for default. The dismissal order was subsequently set aside and it was held that on the restoration of the suit all the ancillary orders got revived and the attachment was available to the decree-holder who obtained a decree after the restoration of the suit. It was urged for the appellant in this case that on the dismissal of the suit before the review petition was allowed, the attachment had been terminated, and it cannot be said that the allowing of the review amounted to a restoration of the proceedings in the suit so as to enable the plaintiff who subsequently obtained a decree to have the benefit of the ancillary order which had become inoperative by the dismissal of the suit. If the principle in that case is to be applied to the facts of this case, it can be applied only if by the allowing of the review the suit is to be considered to have been restored, and the decree already passed to have been set aside. If the decree dismissing the suit automatically puts an end to the attachment by reason of the dismissal of the suit, then the attachment in the case of dismissal of a suit for default also must have that effect. When it is made available for the plaintiff who subsequently obtains a decree after the restoration of the suit, it is only on the fiction that the ancillary orders also get restored. It is contended for the appellant that such a fiction cannot be had in the case of a decree which is revised by the same Court after allowing a review, his contention being that it is not a case of restoration of the suit but only a revision of the decree already passed. He relies for this on the observations in *Achyut Vishnu* v. *Tapibai*[3], where it was pointed out that the allowing of a petition for review of an appellate decree did not have the effect of restoring the decree of the first Court but only kept the appellate decree in abeyance. In that case the only question that had to be considered was whether on the allowing of the review the decree of the original Court should be considered to have been restored; but it did not expressly decide the question whether the appeal must be considered to be pending or not. The learned advocate for the respondent rightly contends that on an order allowing the petition for review being passed, the old decree is set aside and the suit is restored to file and a fresh decree will have to be passed. This was pointed out in this Court by Pakenham Walsh, J., in *Abdur Rahiman* v. *Imbichunni*[4] following the observations made by a Bench of the Bombay High Court in *Vadilal* v. *Fulchand*[5]. As pointed out there, there are three stages in a review application. At the first stage it is in the nature of an *ex parte* application and the Court may either reject the application at once or grant a rule calling on the other side to show cause why the review should not be granted. In the second stage the rule may either be admitted or discharged and the hearing

1. (1929) 58 M.L.J. 675 : I.L.R. 53 Mad. 334.
2. (1934) 68 M.L.J. 444 : I.L.R. 58 Mad. 721 (F.B.).
3. (1923) I.L.R. 48 Bom. 210.
4. (1932) 63 M.L.J. 357 : I.L.R. 55 Mad. 871.
5. (1905) I.L.R. 30 Bom. 56.

of the rule may involve to some extent an investigation into the merits. If the rule is discharged, then the case ends. If on the other hand, the rule is made absolute then the third stage is reached ; the case is re-heard on the merits and may result in a repetition of the former decree or in some variation of it. In *Vadilal* v. *Fulchand*[1], it was pointed out that even if there is to be a repetition of the old decree it is not the old decree but it is a fresh decree. The case-law on this point was considered by the Calcutta High Court in *Gour* v. *Nilmadhab*[2], and after citing *Vadilal* v. *Fulchand*[1], *Nanhe* v. *Mangat Rai*[3], *Golab Chand* v. *Janki Koer*[4], *Aryalpurath* v. *Cheekiladen Ahmed*[5] and *Gour* v. *Rakhal*[6], the learned Judges observed as follows :—

> " These decisions are authorities for the proposition that when the application for review is granted, the decree previously made is vacated."

In this case the moment the review was allowed the decree already passed was vacated and the suit must be considered to have been restored to file and with the restoration of the suit all the ancillary orders also get restored and the decree passed subsequently is the decree of the trial Court itself.

Both the Courts below were hence right in finding that the attachment revived and enured for the benefit of the decree-holder who obtained the decree subsequently after the review petition was allowed.

In the result the second appeals fail and are dismissed with costs.

Leave refused.

K.S. ——— *Appeals dismissed.*

[SPECIAL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE MOCKETT AND MR. JUSTICE KRISHNASWAMI AYYANGAR.

In the matter of a Pleader, Madura.*

Legal Practitioners' Act (XXI of 1926), section 13 (f)—*Pleader guilty of offence under rule 34* (6) (c) *of Defence of India Rules—If ' misconduct.'*

A pleader was convicted of an offence under rule 34 (6) (*c*) of the Defence of India Rules for having sent letters to the District Magistrate calling upon him to " Quit India here and now " as part of a political agitation at a time when many parts of India were in a very agitated state and there was threat of invasion of the country by Japan.

In the circumstances, *held*, that the pleader's action in committing the offence amounted to misconduct and misconduct of such a nature as would justify the taking of disciplinary action under section 13 of the Legal Practitioners' Act.

The Advocate-General (*Sir A. Krishnaswamy Ayyar*) in support of the notice.

S. Ramaswami Ayyar for the Pleader.

The Court delivered the following

JUDGMENTS : *The Chief Justice.*—The respondent is a pleader who was practising in Madura. On the 18th November, 1942, he was convicted by the City Magistrate of Madura of an offence under rule 34 (6) (*c*) of the Defence of India Rules and was sentenced to undergo rigorous imprisonment for a period of eight months. Rule 34 (6) defines what is a prejudicial act and clause (*c*) says it is a prejudicial act to render a member of His Majesty's forces or a public servant incapable of efficiently performing his duties as such, or to induce a member of His Majesty's forces or a public servant to fail in the performance of his duties as such. Rule 38 (1) (*a*) says that no person shall, without lawful authority or excuse, do a prejudicial act and sub-rule (5) says that if a person contravenes any of the provisions of the rule, he shall be punishable with imprisonment for a term which may extend to five years or with fine or with both.

On the 12th October, 1942, the respondent wrote to the District Magistrate of Madura enclosing a pamphlet, which was headed " the duty of a faithful and res-

1. (1905) I.L.R. 30 Bom. 56.
2. A.I.R. 1923 Cal. 113.
3. (1913) 20 I.C. 647.
4. (1913) I.L.R. 41 Cal. 286.
5. (1909) 2 I.C. 204.
6. (1916) 27 C.L.J. 326.

*Ref. Case No. 5 of 1943. 24th March, 1943.

ponsible British Official of the Government of India." The pamphlet called upon the British Government to quit India "here and now." In the covering letter the respondent said,

> "I hereby intimate to you that I am going to carry on the 'Quit India' propaganda on the lines contained in the leaflet herewith annexed and for the reasons stated therein, I request you to 'Quit India' here and now."

The Ramnad District Board had been suspended and a special officer appointed to carry out its duties. The respondent also sent a copy of the pamphlet to the special officer and wrote to him the following letter:

> "The leaflet herewith sent will show how necessary it is that power should be transferred to the people of India. The District Board which passed the resolution disapproving the act of the Government in having arrested the leaders responsible for the passing of All India Congress Committee resolution has been superseded. Your taking charge of the administration as appointee of the Government in the place of the people's representative will only aggravate the anti-Government feeling and I therefore request that you resign your post immediately."

The prosecution was based on the pamphlet and these letters. The Magistrate held that in sending the pamphlet and letters the respondent had done a prejudicial act which was punishable under the Defence of India Rules. The validity of the conviction is not open to question in this Court. The conviction having been brought to its notice this Court called upon the respondent under section 13 (*f*) of the Legal Practitioners' Act to show cause why disciplinary action should not be taken against him.

When the pamphlet was sent to the officers mentioned many parts of India were in a very agitated state. Riots had broken out and there was considerable destruction of Government and Railway property. In addition there was threat of an invasion of India by Japan. The Court is not concerned with political opinions unless the expression of them involves the committing of an offence, or constitutes conduct improper on the part of a legal practitioner, who is a part of the machinery for the administration of justice. The object of writing these letters and sending copies of the pamphlet was to induce responsible officials to leave their posts and thereby contribute to the breakdown of the machinery of Government. It would have been a very serious matter so far law and order was concerned if the District Magistrate of Madura had at this juncture quitted his post and the same remark applies to the special officer appointed to carry on the duties of the District Board. In my opinion there is no doubt that the respondent did something which he should not have done as a member of the legal profession and that he is liable to disciplinary action under the Legal Practitioners' Act. If there were any doubt on this question, it would be set at rest by two decisions of this Court, one being In the matter of *a Second Grade Pleader*[1], and the other In the matter of *K.M., First Grade Pleader*[2]. In both these cases action was taken under the Legal Practitioners' Act against pleaders who had participated in the civil disobedience movement of 1921-22. In the first of these cases, the pleader had delivered speeches in which he instigated people not to pay taxes and in one case not to pay taxes till there had been a meeting of the Congress, the decision of which, the respondent apparently advised, should guide the population as to whether they should or should not pay the taxes to the recognised authorities. He had also stated that he had objected to English Courts and their methods and recommended the people to eschew them and to set up Courts of their own. The Court held that the pleader had brought himself within the mischief of section 13 (*f*) of the Legal Practitioners' Act. This case was decided by a Full Bench of this Court consisting of Schwabe, C.J., and Coutts-Trotter and Krishnan, JJ. I find myself in entire agreement with what Coutts-Trotter, J., said in that case and will quote the following passage from his judgment:

> "But while the Courts will always uphold the liberty of the subject in thought or speech, an applicant, who comes to ask for the issue or renewal of a sanad, is applying to be treated as a part of the machinery, for the maintenance of law and order in the body politic and to take an active part in administering, for the other subjects of the Crown, the benefits that may be supposed to result from the upkeep of law and order. It is intolerable and illogical that a man should seek to be put in that position, while at the same time he is saying that law and order should be disobeyed, that

1. (1923) 45 M.L.J. 684 (F.B.).
2. (1924) 92 I.C. 214 (F.B.).

taxes are not to be paid and that all public offices are to be abandoned, in order to paralyse the very life of the body politic, apart altogether from any other views he may entertain, as to the desirability of the personnel or the particular members of the Government he attacks, or the particular character of the transactions carried on, in these Courts."

As I have already indicated the object of the respondent in the present case was to bring about a breakdown in the machinery of Government just as it was the object of the pleader in that case. In the matter of *K.M., First Grade Pleader*[1], was decided by the same Full Bench and there Coutts-Trotter, J., observed :

"He may be a perfectly honourable man ; he may act from conscientious motives ; he may in conceivable circumstances be a patriot. It may be imagined that he should not be punished or even prosecuted for holding or expressing these opinions. All our business is to say that, however admirable a person he may be, he cannot consistently with his professions ask to be considered and to be adopted as part of the machinery of this Court for enforcement of law and order."

With these observations Schwabe, C.J., agreed, as I do here.

There are two judgments of the Privy Council which also show that in circumstances such as we are considering, the Court has power to take action under the Legal Practitioners' Act. In *Shanker Ganesh Dabib* v. *Secretary of State for India*[2], a pleader practising in the Court of the Judicial Commissioner, Central Provinces and Berar, had his sanad taken away under section 13(*f*) of the Legal Practitioners' Act until such time as he satisfied the Court by his conduct that he was fit for re-admission. This pleader had taken part in an agitation against a local tax. Lord Buckmaster said :

"The offence which he had committed was connected with an agitation against payment of the *Mahar Baluta*, and it appears that in the course of such agitation he did not confine himself to protests, however vehement, against the tax, or against its injustice, but that he urged an organised resistance to payment, and attempted to establish a system which would have impeded and might have defeated its recovery with the grave danger to the public peace. These considerations led to the conviction to which reference has been made, and caused his conduct as a pleader to be brought before the Court in their jurisdiction under the Legal Practitioners' Act of 1879. Their Lordships are of opinion that the circumstances to which they have referred were sufficient to find jurisdiction under section 13, sub-section (*f*) of that Act, which is not confined to acts done in a professional capacity."

In *Advocate-General of Bombay* v. *Phiroz Rustomji*; *Advocate-General of Bombay* v. *Minocher Rustomji ; District Government Pleader, Kolaba* v. *Pitambardas Gokuldas ; District Government Pleader, Broach* v. *Motilal Hargovandass*[3], the Judicial Committee declared that misconduct, though not committed in a professional capacity entitled the Court to take disciplinary action under section 10 (1) of the Bar Councils Act. Lord Blanesburgh there observed :

"It was for the Court to decide whether conviction, of having been a member and having assisted and managed the operation of an unlawful association having for its object interference with the administration of the law or with the maintenance of law and order and constituting a danger to the public peace, was evidence of such misconduct on the part of an advocate as to render him unfit for the exercise of his profession, or to call for the Court's censure. It was for the impugned advocate to adduce any considerations which might induce the Court to refrain from taking disciplinary action."

The respondent has expressed no regret for his conduct. His learned counsel had made it clear that he does not intend to express regret. It has merely been suggested that the conduct of the respondent is such that disciplinary action is not called for. I certainly disagree. I have said sufficient to indicate that the respondent's action does in my opinion constitute misconduct and misconduct of such a nature that this Court is justified in taking disciplinary action under section 13 of the Legal Practitioners' Act. This is the first case which has come before the Court since the civil disobedience movement of 1921-22 and I consider that it will here be sufficient if the respondent's sanad is suspended for the period of two years from the date on which he comes out of prison.

Mockett, J.—I entirely agree and it is only because of two arguments which Mr. S. Ramaswami Ayyar addressed to us that I desire to add a few words. Mr. Ramaswami Ayyar argued that we were being invited to take into account the political views of a member of the Bar and that additional punishment was sought

1. (1924) 92 I.C. 214 (F.B.).
2. (1922) 44 M.L.J. 32 : L.R. 49 I.A. 319 : I.L.R. 49 Cal. 845 (P.C.).
3. (1935) 69 M.L.J. 431 : L.R. 62 I.A. 235 : I.L.R. 59 Bom. 676 (P.C.).

to be inflicted upon him for an offence for which he had already been punished. There is no foundation for these contentions. In the case to which my Lord referred—In the matter of *a Second Grade Pleader*[1],—Coutts-Trotter, J., as he then was stated as follows:—

"I want to make it as clear as I can that, speaking for myself, the last thing that I think that we should consider ourselves concerned with in the ordinary way is what the political opinions of anybody are whether they are members of the legal or any other profession."

These observations express my views entirely and I do not think that it can ever be doubted that this is the attitude of the Court towards an expression of opinion; but if owing to these opinions or for any other reason an individual does an act which brings him within the disciplinary provisions of the Legal Practitioners' Act or the Bar Councils Act, then the Court, whose duty it is to deal with these matters, has to consider the act of the individual. His reasons for the act, in my opinion, are of secondary importance. In this particular case what the pleader did was to call upon two responsible officers to abandon their posts without any form of notice to their superiors. He did it at a time when this country was in a state of unrest and in peril. Of those facts, they being notorious, I can take judicial notice. What the results would have been one does not like to contemplate because it must be remembered that though this was the act of this individual pleader, if it was a proper act, it could have been done by innumerable other persons. For this he was convicted under the Defence of India Rules and his case now comes before us and we are dealing with it not with a view to give him additional punishment but purely from the point of view of whether it is a breach of the discipline of the Bar. A cursory perusal of the Defence of India Rules shows that there are offences which on the face of them seem to involve no moral turpitude. There are offences within those rules which may well be committed without any intention of offending. This case comes before us because by committing an offence within the Defence of India Rules the pleader has been guilty of conduct which we have to consider in relation to his professional status. Remembering that a member of the Bar owes his rights and privileges to his association with the administration of justice, I am satisfied, whether it was an offence under the Defence of India Rules or any other provision of law, or whether it was no offence at all, that for a member of the Bar to call upon a judicial officer in the position of a District Magistrate, an officer on whom lies a large measure of responsibility for the administration of criminal justice and law and order in the District, to abandon his duties, shows that he is not fit to be associated (at least for a time) with a profession which is bound to support the administration of justice. The two positions seem to me inconsistent and irreconcileable.

For these reasons which are already contained in my Lord's judgment I agree with the order proposed.

Krishnaswami Ayyangar, J.—I also agree in the order pronounced by my Lord. It is enough to say that by writing the two offending letters the pleader has brought himself within the mischief of section 13 (*f*) of the Legal Practitioners' Act.

K.S. ——— *Sanad suspended.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SOMAYYA.

Gogula Venkanna and others .. *Appellants**

v.

The Panchayat Board, Munagapaka, represented by the President, District Board, Vizagapatam and another .. *Respondents.*

Madras Local Boards Act (XIV of 1920), section 45-B—Scope—Debts of superseded Panchayat Board—Liability of Provincial Government not subject to possession of assets of the superseded Board.

Section 45-B of the Local Boards Act lays down expressly that the Provincial Government shall be subject to all the liabilities of the superseded Panchayat and this is not made subject to the possession of any assets of the superseded panchayat.

1. (1923) 45 M.L.J. 684 (F.B.).

*A. A. A. O. Nos. 225 and 226 of 1942. 22nd February, 1943.

Appeals against the orders of the District Court of Vizagapatam, dated 21st March, 1942, in A.S.Nos. 14 of 1942 and 347 of 1941 respectively (E. A. No. 790 of 1940 in O. S. No. 325 of 1936 and E. A. No. 791 of 1940 in O. S. No. 66 of 1937, District Munsiff Court, Vizagapatam, respectively).

K. Kameswara Rao for Appellants.

K. Kuttikrishna Menon (Government Pleader) for Respondents.

The Court delivered the following

JUDGMENT.—These cases seem to be directly covered by the express wording of section 45-B of the Local Boards Act. This section enacts that if a panchayat is superseded, the Provincial Government shall be subject to all the liabilities of the panchayat as on the date of the dissolution or supersession, and it also says that if the panchayat is later on reconstituted, until the date of reconstitution, the Provincial Government will be liable and after that date the reconstituted board will be liable for all the liabilities of the superseded panchayat. The liability in question in each of these two appeals arose under a decree of Court which the appellants had obtained against the superseded or dissolved panchayat. The lower Courts have, on what they considered to be the intention of the Legislature, refused to apply the plain provisions of the section and have restricted the provisions of section 45-B to a case where there are assets of the panchayat in the hands of the Provincial Government. It is said that otherwise the general tax-payer will suffer great loss and that it could not be the intention of the Legislature to take upon itself the liability of paying all the debts of the superseded board. All this is, in my opinion, wholly irrelevant when the wording of the section is clear. Section 45-B lays down expressly that the Provincial Government shall be subject to all the liabilities of the superseded panchayat and this is not made subject to the possession of any assets of the superseded panchayat. If, as stated by the learned Government Pleader on behalf of the respondents, a new panchayat has been reconstituted for that village, then under section 45-B further execution will proceed against the reconstituted panchayat. But until the date of reconstitution the Provincial Government will be liable.

The orders of the lower Courts are reversed and the execution petitions will be taken on file by the first Court and further execution will proceed according to law. The respondents will pay the costs of the appellants in all the Courts. Time for payment three months.

Leave to appeal is refused.

K.S. — *Appeals allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE SHAHAB-UD-DIN.

Gundu Venkatalingam .. *Appellant** (*Respondent*)

v.

Gundu Mrutyanjayadu .. *Respondent* (*Applicant*).

Letters Patent (Madras), clause 15—Undertaking not to alienate property in order to avoid an order for security for costs being made—Sale in breach of undertaking—If of criminal or civil nature—Appealability.

An order committing a party for contempt of Court, in alienating certain properties in breach of an undertaking not to alienate (so as to avoid an order for security for costs being passed against him) is not an order in a criminal proceeding within the meaning of clause 15 of the Letters Patent but one in a civil matter and is appealable.

Appeal under clause 15 of the Letters Patent against the order of Byers, J., dated 1st February, 1943 and made in Contempt Application No. 2 of 1942 in C.M.P. No. 2703 of 1942 in A. S. No. 155 of 1942 on the file of the High Court of Judicature at Madras preferred against the decree of the District Court of Kistna in O. S. No. 12 of 1940 and the order of the District Court of Kistna dated 3rd August, 1942, and made in I. A. No. 398 of 1942 in O. S. No. 12 of 1940.

B. Sitarama Rao for *K. Kameswara Rao* for Appellant.

K. Bhimasankaram for Respondent.

*L. P. A. No. 13 of 1943. 24th February, 1943.

The Court made the following

ORDER.—This is an appeal against an order passed by Byers, J., committing the appellant to prison for contempt of Court. The appellant has filed an appeal against the decree passed in a partition suit instituted by his brother, the respondent, and this appeal is pending. When he had been served with notice of the appeal the respondent applied for an order directing the appellant to furnish security for costs in the event of its being dismissed. This application was based on the allegation that the appellant was alienating his share of the family properties and that if the appeal were dismissed the respondent would not be able to recover his costs. In order to avoid an order for security being passed against him, the appellant gave an undertaking that he would not alienate his interests in any of the properties which were the subject-matter of the appeal. In breach of the undertaking he sold his interests in one property for the sum of Rs. 1,500. This was a clear breach of his undertaking and constituted a contempt of Court for which the learned Judge ordered that he be sent to prison for a period of six months. The present appeal is against this order.

The learned advocate for the respondent has taken a preliminary objection. He says that no appeal lies because the order passed by Byers, J., was not a judgment within the meaning of clause 15 of the Letters Patent and moreover was an order passed in the exercise of criminal jurisdiction. Clause 15 of the Letters Patent provides that an appeal shall lie from the judgment of a Judge sitting alone when the judgment has not been "passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court, and not being an order made in the exercise of revisional jurisdiction, and not being a sentence or order passed or made in the exercise of the power of superintendence under the provisions of section 107 of the Government of India Act, or in the exercise of criminal jurisdiction." It is said that the order complained of was passed in a quasi-criminal matter and therefore passed in exercise of criminal jurisdiction.

It is clear that the order in this case falls within the definition of "judgment" given by the Full Bench in *Tuljaram Rao* v. *Alagappa Chettiar*[1]. Therefore what the Court has to decide is whether the order is one passed in the exercise of what amounts to criminal jurisdiction. A Full Bench of the Calcutta High Court, without giving reasons, held in *Mohendra Lal Mitter* v. *Anundo Coomar Mitter*[2], that an appeal lay from an order refusing an application to commit for contempt of Court; but a contrary opinion was expressed by the Bombay High Court in *Narendrabai Sarabai* v. *Chinnubai Manibai*[3]. In the latter case the question was whether the order which had been passed was a "judgment" and the Bombay High Court has always accepted the definition of "judgment" given by the Calcutta High Court in *The Justices of the Peace for Calcutta* v. *The Oriental Gas Co.*[4] The definition given there differs from the definition given by this Court in *Tuljaram Rao* v. *Alagappa Chettiar*[1]. Neither the Calcutta High Court's decision nor that of the Bombay High Court renders assistance in the present case, but assistance is to be obtained from the decision of the Privy Council in *S. N. Banerjee* v. *Kuchwar Lime and Stone Co., Ltd.*[5] In that case there were consolidated appeals from an order passed by the Patna High Court directing the appellants to pay costs in certain contempt proceedings. The High Court had given leave to appeal and its action in doing so was questioned when the matter came before the Judicial Committee. It was said that proceedings in contempt were quasi-criminal in their nature and therefore leave to appeal could not be granted under the Code of Civil Procedure. The objection was overruled. In delivering the judgment of the Board, Lord Porter said:

"A preliminary objection to their hearing was made by the respondents on the ground that the contempt in both cases or at any rate in the case of Ghose and Bannerjee was of the nature of a criminal matter, that the leave granted was granted under the Civil Procedure Code and inasmuch

1. (1910) 21 M.L.J. 1 : I.L.R. 35 Mad. 1.
2. (1897) I.L.R. 25 Cal. 236 (F.B.).
3. (1936) I.L.R. 60 Bom. 894.
4. (1872) 8 Beng.L.R. 433.
5. (1938) I.L.R. 17 Pat. 770 (P.C.).

as it was in the wrong form this Board should hold on the authority of *Radha Krishn Das* v. *Rai Krishn Chand*[1], that leave had not properly been given.

The objection is purely technical and so far as the Secretary of State is concerned, their Lordships think it now sufficiently established that a committal for a finding of contempt for breach of an injunction is not criminal in its nature and is properly dealt with under the Civil Procedure Code. See *Scott* v. *Scott*[2]."

It appears to us that this decision makes it quite clear that an order such as the one now under appeal is not an order in a criminal proceeding within the meaning of clause 15 of the Letters Patent, but in a civil matter. This being a civil matter and the order complained of being a "judgment" within the definition laid down by this Court, we hold that the appeal lies.

Coming now to the merits, Mr. Sitarama Rao on behalf of the appellant says that the appellant is prepared to pay into Court the sum which he received for the sale which took place in breach of his undertaking and that this sum may remain in Court as security for the respondent's costs. On this understanding he asks that the appeal should be allowed so far as the remainder of the term of imprisonment is concerned. The appellant was committed to prison on the first of this month and therefore has only served 24 days of the period of committal. His breach of the undertaking was a very serious contempt and we do not consider that he should be let out of the prison at this stage. If he pays into this Court within this week the Rs. 1,500, we will reduce the period from six months to two months, which will mean that the appellant will be liberated at the end of March. If he does not fulfil his undertaking to pay the money into Court within the time allowed, the order of Byers, J., will stand.

As the respondent is the appellant's brother we make no order as to costs.

K.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

H. Sitarama Reddy .. *Appellant**

v.

Bilehal Somappa and another .. *Respondents.*

Madras Debt Conciliation Act (XI of 1936), section 25—Court ignorant of the existence of application for conciliation before the Board—If clothes it with jurisdiction in regard to subsequent proceedings.

When once an application has been filed before the Debt Conciliation Board any Court enquiring into the same matter is deprived *ipso facto* of its jurisdiction to proceed further, the prohibition being statutory. The fact that the Court did not know of the existence of the application and was therefore unaware of the fact that it had no jurisdiction to proceed, does not clothe it with jurisdiction in regard to subsequent proceedings. The analogy of a stay order by a superior Court to an inferior Court where the efficacy of the stay order depends upon its being communicated, does not apply to the statutory prohibition under section 25 of the Debt Conciliation Act.

Appeal against the order of the District Court of Bellary dated 29th June, 1942, and made in App. No. 104 of 1940, preferred against the order of the Court of the District Munsiff of Bellary in E. A. No. 483 of 1940 in E. P. No. 594 of 1939 in O. S. No. 792 of 1934.

P. Chandra Reddy for Appellant.

K. Srinivasa Rao for Respondents.

The Court delivered the following

JUDGMENT.—The appellant obtained a decree and brought property of the judgment-debtor to sale in execution of his decree. Before the property had been brought to sale, the judgment-debtor had applied to the Debt Conciliation Board, and under section 25 of the Debt Conciliation Act the Court was therefore bound to stay its proceedings. The Court was not however made aware of the existence of an application before the Debt Conciliation Board, and so it proceeded with the sale. Subsequently, the judgment-debtor applied to have the sale set aside on the

1. (1901) L. R. 28 I. A. 182 : I.L.R. 23 All. 415 (P.C.).
2. (1913) A.C. 417, 456.

*A. A. O. No. 109 of 1942. 26th November, 1942.

ground that it was void. The executing Court declared that it was. On appeal, the learned District Judge said he would not have hesitated to confirm the sale if it had not been for the fact that the decree-holder appellant, who was a practising advocate, was aware of the existence of those proceedings before the Board and failed in his duty to inform the Court.

A preliminary objection was taken that no appeal lies. That objection seems to be well founded, in that the suit was of a small cause nature, its value being Rs. 400. In view, however, of the fact that the question of the jurisdiction of the Court to set aside the sale was raised, the appellant was permitted to convert the appeal into a civil revision petition.

Section 25 of the Debt Conciliation Act says that,

"When an application has been made to a Board under section 4, any suit or other proceedings then pending before a Civil Court . . . . shall not be proceeded with . . . . . ."

which means that the Court has no jurisdiction to proceed with the application when once an application has been made before the Board. The fact that the Court did not know of the existence of the application and that the Court was therefore unaware of the fact that it had no jurisdiction to proceed, does not clothe it with jurisdiction in regard to subsequent proceedings. The analogy of a stay order by a superior Court to an inferior Court is not a good one; for the efficacy of a stay order depends upon its being communicated. It is a prohibitory order by a superior Court to an inferior Court and the word "order" connotes the communication of the substance of the order to the inferior Court; if it is not communicated it is not an order. In this case, however, we are dealing with a statutory prohibition; and when once an application has been filed before the Debt Conciliation Board any Court enquiring into the same matter is deprived *ipso facto* of its jurisdiction to proceed further.

I agree with the learned advocate for the appellant that if the proceedings were not *ab initio* void the fact that the decree-holder failed in his moral obligation to the Court to inform it of what had taken place would not render the proceedings void, though it was very reprehensible on the part of the appellant not to inform the Court of what he knew had taken place, the obligation being all the stronger because the appellant was a member of the bar.

The appeal is dismissed with costs.

K.S. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Nagati Yedukondalu and another .. *Petitioners**

v.

Pedaprolu Suryanarayana Rao and another .. *Respondents.*

Madras Hindu Religious Endowments Act (II of 1927), sections 76 and 78—Public temple—Property claimed as private—Jurisdiction of Court to decide the ownership of the property.

In an application by the trustees of a temple under section 76 of the Madras Hindu Religious Endowments Act for possession of certain properties, the petitioners claimed the properties as their own private properties along with the temple itself and the lower Court held that the temple was a public one and the properties belonged to it. On the question of its jurisdiction to decide the ownership of the properties,

Held, that where the Court was empowered to hand over trust properties to a temple, it should be deemed to have also the power to decide whether a property was temple property.

Narayana Aiyangar v. *Desikachariar*, (1933) 65 M.L.J. 315, referred to.

Subrahmaniam v. *Subbayi*, (1933) M.W.N. 934, dictum of Ramesam, J., dissented from.

(1940) 52 L.W. 7 (Short Notes), not followed.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the District Court of Kistna at Chilakalapudi, dated 10th November, 1942, and made in O. P. No. 42 of 1940.

*C. R. P. No. 1660 of 1942. 23rd February, 1943.

M. Appa Rao for Petitioners.

K. Kameswara Rao for Respondents.

The Court delivered the following

JUDGMENT.—In an application by the present trustees of Sri Ramalayam appointed by the Hindu Religious Endowments Board under section 76 of the Hindu Religious Endowments Act for possession of certain godowns from the petitioners, who claimed to be the private owners of the temple as well as of the godowns which were the subject of this application, it was held by the lower Court that Sri Ramalayam is a public temple and that the property belongs to the temple and not to the petitioners. In this revision petition the only question is whether the lower Court had jurisdiction to decide the question whether the property belongs to the petitioners or to the temple.

The petitioners rely on a decision of Patanjali Sastri, J., reported in (1940) 52 L.W. 7 (Short Notes). I have read a copy of the judgment provided by Mr. Appa Rao and I find that Patanjali Sastri, J., held, in a case where possession was resisted by a tenant claiming to be an occupancy tenant that the Court had no jurisdiction to hand over property unless it admittedly belonged to the temple. He relied on an *obiter dictum* of Ramesam, J., in *Subrahmaniam* v. *Subbayi*[1]. In the latter case the District Judge had refused to go into a difficult question of title ; and Ramesam, J., upheld the refusal of the District Judge on the ground that he was not bound to do so. Disagreeing with Pandalai, J., in *Ramireddi* v. *Sreeramulu*[2] and Curgenven, J., in *Guruvammal* v. *Arumugha Padayachi*[3] he held that section 78 was intended to apply only to admitted endowments. He later said that even if that was not the case and an enquiry was a matter for the Court's discretion, he would still be justified in dismissing the petition. He also disagreed with the opinion of Devadoss, J., in *Vythilinga* v. *Ramanuja*[4] and distinguished *Narayana Iyengar* v. *Desikachariar*[5]. So it is clear that Ramesam, J., expressed an opinion which was contrary to the trend of the decisions of this Court. It seems to me, with due respect to Patanjali Sastri, J., and Ramesam, J., that where a Court is empowered to hand over temple property to the trustees, it must be deemed to have also the power to decide whether a property is temple property. The power of a Court to go into these ancillary questions is dealt with very fully by Beasley, C. J. and Bardswell, J., in *Narayana Iyengar* v. *Desikachariar*[5]. The section itself does not use the expressions "admitted endowments, etc." If a Court could order the handing over only of admitted endowments then section 78 could be rendered nugatory by the respondent's claiming the property as his own. Immediately that plea was raised, the Court would be automatically precluded from passing an order in favour of the petitioners and the petition would have to be dismissed.

I am not prepared to say, therefore, that the order of the lower Court was one without jurisdiction. The petition is therefore dismissed with costs.

K.C. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMAYYA.

Mokarula Pitchayya .. *Appellant * in both (4th Defendant)*

v.

Beggavarapu Venkatakrishnayya and others. *Respondents in both (Plff. & Defts. 1 to 3).*

Specific Relief Act (I of 1877), sections 27 (c) and 42—Agreement for sale by father—Prior title which might be displaced—Suit for specific performance against sons and alienee—Maintainability—Nature of right of plaintiff.

Section 42 of the Specific Relief Act does not require that the plaintiff should have a right in the property which is the subject-matter of the suit. An agreement to sell in favour of a person certainly gives him a right as to or in relation to the property which is the subject of the agreement. A person

1. (1933) M.W.N. 934.
2. A.I.R. 1933 Mad. 120.
3. (1931) 61 M.L.J. 894.
4. A.I.R. 1929 Mad. 845.
5. (1933) 65 M.L.J. 315.

*S. A. Nos. 214 and 215 of 1942. 22nd February, 1943.

who files a suit for specific performance and claims to get a sale deed through Court would have a right as to the property and section 42 would apply to such a case.

Where the father of defendants 1 to 3 after conveying the suit property nominally to the fourth defendant entered into an agreement with the plaintiff to sell the suit property to him, and the father having subsequently died the plaintiff instituted a suit for specific performance against defendants 1 to 4,

Held, that the suit was maintainable against all the defendants under section 27 (*c*) of the Specific Relief Act and that all the defendants could be asked to execute the sale deed and deliver possession to the plaintiff.

Appeals against the decrees of the District Court of Kistna at Chilakalapudi in A. S. Nos. 342 and 352 of 1940, preferred against the decrees of the Court of the District Munsiff of Gudivada in O. S. Nos. 293 of 1939 and 210 of 1938.

P. Satyanarayana Rao for Appellant.

Ch. Raghava Rao for Respondents.

The Court delivered the following

JUDGMENT.—These two second appeals arise out of the same transaction which was an agreement to sell the suit property to the plaintiff. The contract was executed by Pattabhiramayya, the father of defendants 1 to 3 in second appeal No. 214. The appellant in the two second appeals was the fourth defendant in O. S. No. 293 of 1939 out of which S. A. No. 214 of 1939 arises and was the first defendant in the other suit. The first suit was for specific performance of the agreement executed by the father of defendants 1 to 3. The fourth defendant is a person in whose name the property had been placed by Pattabhiramayya and the finding of both the Courts is that it was merely a nominal transaction not intended to pass any title to the fourth defendant. In fact the agreement executed by Pattabhiramayya recites that for certain reasons, the property had been placed in the name of the fourth defendant and that a proper conveyance would be got executed by the fourth defendant. The main defence was that there was no contract in fact binding on both the parties and that it was a mere offer which stood withdrawn by the death of Pattabhiramayya or by the refusal of defendants 1 to 3 to convey. Another defence is that the fourth defendant is not the person against whom a decree for specific performance could at all be granted.

On the first question, on reading the whole of the agreement it is clear that it was not a mere offer by Pattabhiramayya so as to come within the principle of the ruling in *Eagala Nagappa Naidu* v. *Munuswami Iyer*[1]. Though executed by one alone, it is obviously binding on both the parties. Under section 27, clause (*c*) of the Specific Relief Act, specific performance may be declared not merely against a party to the contract but also against a person claiming under a title which, though prior to the contract and known to the plaintiff, might have been displaced by the defendant. Here a title had been created by the father of defendants 1 to 3 in the name of the fourth defendant. The title was prior to the suit contract and was known to Pattabhiramayya but it was a title which might have been displaced by Pattabhiramayya whose sons are the defendants or by defendants 1 to 3. Pattabhiramayya could have filed a suit for a declaration that the title always vested in him and that the fourth defendant had no title at any time. Really it is a case of the fourth defendant being merely an *alias* for Pattabhiramayya or for defendants 1 to 3. The apparent title of the fourth defendant might have been displaced by defendants 1 to 3 or their father. Therefore, this is a case directly covered by section 27, clause (*c*). Specific performance can be decreed against not merely defendants 1 to 3 but also the fourth defendant. In this view, all the defendants can be asked to execute the sale deed and to deliver possession to the plaintiff. No doubt by way of abundant caution, the plaintiff filed a suit for a declaration that the sale deed by Pattabhiramayya in favour of the appellant was a mere nominal transaction.

It is urged that the appellant had no legal title and no legal right in the property which would sustain a suit for a declaration. But section 42 of the Specific Relief Act does not require that the plaintiff should have a right in the property which

1. (1922) 42 M.L.J. 432 : I.L.R. 46 Mad. 30.

is the subject-matter of the suit. The wording is—

"Any person entitled to any legal character or to any right as to any property . . . ."

Any right as to any property is certainly not any right in the property. An agreement to sell in favour of a person certainly gives him a right as to or in relation to the property which is the subject of the agreement. In this case, the plaintiff having filed a suit for specific performance and claimed to get a sale deed through Court, would have a right as to the property and therefore section 42 would cover the case as well.

The second appeals are dismissed with costs.

No leave.

B.V.V. ——— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUPPUSWAMI AYYAR.

P. N. V. Ratnaswami Nadar .. *Appellant**

v.

Virudhunagar Municipal Council, through its Commissioner at Virudhunagar .. *Respondent.*

Madras District Municipalities Act (V of 1920), section 182—Prescriptive right acquired by owner to have projections over the street—Right of municipality to direct their removal—Liability to pay compensation.

Even if a projection is found above or over the area constituting the street, the municipality is entitled under section 182 of the District Municipalities Act of 1920 to have it removed. Even if the owner of the premises has obtained a prescriptive right to have the projections it would be open to the municipality to direct their removal ; but in such a case the Municipal Council should make a reasonable compensation to every person who suffers damage by the removal or alteration of the same. The fact that the Municipality is bound to pay compensation will not entitle the owner to obtain a declaration or injunction that the municipality is not entitled to have the projections removed.

Appeal against the decree of the Court of the Subordinate Judge of Ramnad at Madura in A. S. No. 21 of 1941 preferred against the decree of the Court of the District Munsiff of Sattur in O. S. No. 30 of 1939.

K. V. Srinivasa Aiyar for Appellant.

K. Kuttikrishna Menon for Respondent.

The Court delivered the following

JUDGMENT.—The appellant was the plaintiff, whose suit for an injunction restraining the Commissioner of the Virudhunagar Municipality from starting or proceeding with any legal action against the plaintiff to remove the cornice and other projections in front of his house and for a declaration that he is entitled to keep the said cornice and other projections intact without any objection by the defendant, was dismissed by the appellate Court, though it was decreed, except in respect of the stone steps leading to the house, by the first Court.

The appellant is the owner of a big house situate in a lane within the municipal limits of Virudhunagar municipality. Even in the lifetime of the appellant's father the municipality issued a notice to him to remove certain projections in and over the street in front of the house. The projections consisted of some cornices in the first and second terraces, monkey tops over the windows, steps leading to the house and a kodangai over the steps. The father, evidently a prudent man, thought that he would be able to get over the difficulty by applying to the municipality for a licence. The municipality was about to grant the licence ; but before the fees were paid he died. The appellant thought otherwise and filed a suit. The contention of the municipality is that under section 182 of the District Municipalities Act the municipality has the right to direct the owners of houses to remove any projections over and encroachments into the street and that therefore it was perfectly justified in asking the appellant to remove those projections and taking steps to prosecute him when he failed to comply with the order of the municipality.

The first Court found that so far as the steps were concerned they were encroachments, but that with respect to the other projections as they were 15 feet

*S. A. No. 44 of 1942. 10th November, 1942.

above the surface of the street they were not encroachments but were only ornamental structures quite innocuous and that therefore the plaintiff was entitled to a decree in respect of those projections. On appeal the learned Subordinate Judge of Ramnad at Madura dismissed the suit holding that under section 182 of the District Municipalities Act, the municipality was entitled to direct the removal of such projections even though they were not in the street but were over the street. Hence this appeal.

The only points for consideration are (1) whether the municipality was entitled to direct the appellant to remove the projections in question and (2) whether the appellant had acquired a prescriptive right to have those projections and if so, is he entitled to any remedy in this suit.

As already stated above, under section 182 of the District Municipalities Act of 1920 the executive authority of a municipality may require the owner or occupier of any premises to remove or alter any projection, encroachment, or obstruction situate against or in front of such premises and *in or over* any street. In the corresponding section of the old Act there were not the words "or over." The decision in *Basaveswaraswami* v. *The Bellary Municipal Council*[1] relied on for the appellant has no application to the facts of this case. There the question considered was as to what was meant by the word "street" and whether the space above 12 feet of the ground was a portion of the street or not as the section of the Act of 1884 under which the proceedings were taken related to encroachments into the street. *The Chairman, Municipal Council, Srirangam* v. *Subba Pandithar*[2] only deals with the question as to whether any prescriptive title could be acquired and if so by encroachment for what period against the municipality. The decision in *Wandsworth Board of Works* v. *United Telephone Co.*[3] relied on for the appellant also has no application to the facts of this case. There also the question was as to what constituted a street whether it was only the surface or any portion below or above the surface and if so what extent of it could be said to constitute the street, and it was held that it is not only the surface of the street but also the area of user which was fixed at 12 feet above and 12 feet below the surface that formed the street. Now in this case the street no doubt may be taken to be the area covering 12 feet above and 12 feet below the surface of the street. But then even if a projection is found above or over the area constituting street, the municipality is entitled under section 182 of the District Municipalities Act of 1920 to have it removed. This question had to be considered by this Court in *Public Prosecutor* v. *Varadarajulu Naidu*[4] and there it was pointed out that in the new Act there are the words "over any street" and consequently it is open to the municipality to direct any owner or occupier of premises abutting a road to remove the obstruction. The plaintiff therefore can have absolutely no justification for complaining that he has been asked to remove the obstructions and projections in question.

With regard to the question of prescriptive title, it is admitted, and it is the finding of both Courts, that the appellant has had these projections for over thirty years. If so, he will have obtained a prescriptive right to have these projections. But then under section 182 (2) of the District Municipalities Act, even if such a prescriptive title had been acquired it would be open to the municipality to direct their removal; but in such cases the Municipal Council should make a reasonable compensation to every person who suffers damage by the removal or alteration of the same. The fact that the Municipal Council is bound to pay compensation will not entitle the appellant to obtain a declaration or injunction that the defendant Municipality is not entitled to have the projections removed. The learned Subordinate Judge has dismissed the suit and though he found that the appellant will be entitled to compensation in case of any such removal he has not stated it in the decretal portion of the order.

In the result, the decree of the lower appellate Court will be modified, by declaring that the appellant will be entitled to claim reasonable compensation if

1. (1912) 23 M.L.J. 479 : I.L.R. 38 Mad. 6.
2. (1913) 25 M.L.J. 297 : I.L.R. 38 Mad. 456.
3. (1884) 13 Q.B.D. 904.
4. (1924) 47 M.L.J. 470 : I.L.R. 47 Mad. 716.

he suffered any damage by the removal of any of the projections which are the subject-matter of the suit. In other respects the second appeal is dismissed. The appellant will pay the respondent the costs of this appeal.

Leave refused.

K.S. ——— *Decree modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMAYYA.

The Official Trustee of Madras representing the estate of Varada Venkata Raghava Bajana Mandiram .. *Appellant**

v.

The Corporation of Madras .. *Respondent.*

Madras City Municipal Act (IV of 1919), section 101, clause (a)*—Bhajana mandiram occasionally let out for small rent for performing marriages—Not exempt from property tax.*

Where a building was set apart for public worship, being a *bhajana mandiram* (that is a place where a number of people gather and sing devotional songs in chorus) but occasionally that building was let out for performing marriages and the sums so collected were utilised for the *bhajana mandiram*, exemption from property tax cannot be claimed in respect of the building as it cannot be said that the building was " used for no other purpose " except public worship.

Municipal Council, Palni v. *Sri Dhandayuthapani Devasthanam,* (1940) 2 M.L.J. 897 : I.L.R. (1941) Mad. 322, applied.

Appeal against the decree of the Court of the (Additional) City Civil Judge at Madras in O. S. No. 1365 of 1941.

S. V. Venugopalachari, P. C. Parthasarathi and *S. Krishnaswami* for Appellant.

A. Suryanarayanayya for Respondent.

The Court delivered the following

JUDGMENT.—The point which arises for decision in this case is whether section 101, clause (*a*) of the Madras City Municipal Act applies to this case. The appellant claimed exemption from taxation under section 101 (*a*) in respect of a building which is admittedly set apart for public worship, being a *bhajana mandiram,* that is a place where a number of people gather and sing devotional songs in chorus. Occasionally this building was given to other persons for performing marriages and a small sum was collected from the marriage parties and the sum so collected was utilised for meeting the expenses of the *bhajana mandiram.* The lower Court held that section 101 (*a*) did not apply on the ground that though the building was a place set apart for public purpose it could not be said that it was either actually so used or used for no other purpose. The present appeal is filed by the Official Trustee of Madras who is in charge of the *bhajana mandiram* and the argument is advanced that the exemption claimed ought to have been upheld.

Section 101 (*a*) runs thus :

" The following buildings and lands shall be exempt from the property tax—

(*a*) (places) set apart for public worship and either actually so used or used for no other purpose."

Section 83, clause (1) (*a*) of the District Municipalities Act, so far as the point under consideration is concerned, is word for word the same. That section runs thus :

" The following buildings and lands shall be exempt from the property tax—

(*a*) places set apart for public worship and either actually so used or used for no other purpose."

It is not alleged that during the time when the marriages were being celebrated in the building bhajana or public worship was actually going on. Nor can it be said that the building was used for no other purpose. It was used for a purpose other than that of public worship. In my view this question is really concluded by the decision in the *Municipal Council, Palni* v. *Sri Dhandayuthapani Devasthanam*[1]. In that case the Palni devasthanam built a power house and installed an electric plant at the foot of the hill belonging to it. The entire hill had been admittedly set apart

---

*C. C. C. Ap. No. 34 of 1942. 8th March, 1943.

1. (1940) 2 M.L.J. 897 : I.L.R. (1941) Mad. 322.

for public worship. The devasthanam utilised the electric energy from the power house for lighting the temple and the approaches to it and also supplied it at profitable rates to persons who kept shops and a hotel on the hill. Exemption was claimed on behalf of the devasthanam and it was contended that it was a place set apart for public worship and used for that purpose. The learned Judges held that the property tax was properly levied under section 83 (1) of the Madras District Municipalities Act and that exemption is allowed for places set apart for public worship and used for that purpose and for places set apart for public worship but not actually in use. If therefore a place is used for a purpose other than public worship, it does not fall within the exemption. They added that as the power house was used for commercial purposes as well as purposes of public worship, the conditions of the exemption were not fulfilled. They dissented from an earlier decision of a single Judge of this Court in *Municipal Council, Srirangam* v. *Srirangam Devasthanam*[1]. As Mr. Venugopalachari, the learned advocate for the appellant, rightly urges, the element of profit is not the guiding factor. The only point to be considered is whether the expression " used for no other purpose " can be applied to a case like the present where though the building was admittedly set apart for public worship, it was actually being used occasionally for marriages being performed in it. Performance of marriages cannot in any sense of the term be said to be part of public worship. Private individuals perform the marriage and pay some amount for being allowed the use of this building for performing the marriage. There is no question of public worship during the time. Therefore it is not a case where it could be said that the place was actually used for public worship, nor can it be said that it was not used for any purpose other than public worship. Mr. Venugopalachari relies upon the decision in *Municipal Council of Tirupathi* v. *Sree Mahant Prayag Dasjee Varu*[2]. There the question was whether a certain building used for stabling devasthanam coaches and horses which were employed in carrying drums in temple processions or allowed for the use of respectable pilgrims to whom such honour was shown by the Mahant was exempt from property tax. In so far as the buildings were used for stabling the devasthanam horses which were employed in processions of the deity there could be no question of taxation. The user was admittedly part of public worship, namely, temple processions. Then the next point was whether in so far as the horses were allowed for the use of pilgrims to whom honour was shown by the Mahant it was user which took it out of the exemption. Rightly or wrongly the learned Judges held that that also came within the first portion of section 83. Though the learned Judges used the words "public purpose," we have to take it that really what was meant was that that was also part of public worship. At any rate the section is clear that exemption can be claimed only where a building was used not only for public worship, but was actually so used or used for no other purpose. Whether the interpretation put upon the expression " public worship " in the decision is right or wrong, we have the later decision of a Bench of this Court in *Municipal Council, Palni* v. *Sri Dhandayuthapani Devasthanam*[3].

The result is that the appeal is dismissed with costs.

K.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Abdur Shukur Sahib .. *Petitioner.**

Criminal trial—Complaint that accused made false or frivolous charges by post—Jurisdiction to entertain would be at place where letter was received and opened and not where it was posted.

Where a false or frivolous charge against police officials was made by a letter posted at Polur to the District Superintendent of Police, North Arcot, who received and opened it at Vellore, the effect is the same as if the accused had handed over the letter in person at Vellore and the Magis-

1. (1936) M.W.N. 1088.
2. (1914) 27 M.L.J. 231.
3. (1940) 2 M.L.J. 897 : I.L.R. (1941) Mad. 322.

*Cr. R. C. No. 370 of 1942. (Cr. R. P. No. 360 of 1942). 5th August, 1942.

trate having jurisdiction to entertain a complaint for making the false charge would be the Magistrate at Vellore.

Petition under sections 435 and 439 of the Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of the Second Class Magistrate of Polur dated 11th June, 1942 and made in C. C. No. 245 of 1942.

A. S. Sivakaminathan for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—The accused was charged by the police with preferring a false and frivolous charge against police officials at Polur.

The accused sent a petition containing various allegations, which were subsequently found to be false, to the District Superintendent of Police. His letter was posted at Polur and apparently opened by the District Superintendent of Police at Vellore. The Post Office, therefore, acted as the agent of the accused in carrying this letter to the District Superintendent of Police at North Arcot; and the effect was the same as if the accused had handed over the letter in person to the District Superintendent of Police at Vellore. The false or frivolous charge was therefore made at Vellore and not at Polur. It therefore follows that the Magistrate having jurisdiction would be the Magistrate at Vellore.

The petition is therefore allowed and the Magistrate ordered to return the charge-sheet to be presented to the Magistrate having jurisdiction.

K.S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CHANDRASEKHARA AYYAR.

Ramaswami Sastrigal and another .. *Appellants** (*Plaintiffs*)

v.

R. Subramania Ayyar and another .. *Respondents* (*Defendants*).

Madras Debt Conciliation Act (XI of 1936), section 19—Debt contracted by a Hindu father for family necessity—Sons sued by creditor along with father—Section not a bar to such suit.

If three independent persons unrelated to each other as members of a joint Hindu family borrowed a debt and one of them alone went before the Debt Conciliation Board, section 19 of the Debt Conciliation Act could not be a bar to such a suit filed by the creditor against the other two. There is no distinction between such a case and one, where a father of a Hindu joint family who went before the Conciliation Board in respect of a debt contracted for family necessity and his sons had been sued along with him by the creditor, because the obligation in the latter case arose by reason of the debt being contracted for family necessity and not merely because the sons were under a pious duty to discharge the father's debt.

Appeal against the decree of the District Court of Trichinopoly in A. S. No. 437 of 1940, preferred against the decree of the Court of the District Munsiff of Kulitalai in O. S. No. 365 of 1940.

R. Ramamurthi Aiyar for Appellants.

K. V. Sesha Aiyangar for Respondents.

The Court delivered the following

JUDGMENT.—The lower Courts have taken the view that an application by the father for conciliation of his debt under the Madras Debt Conciliation Act is a bar to the suit not only as regards the father who is the applicant but also his sons who did not go before the Board with any such application for conciliation. This view is based upon section 19 of the Debt Conciliation Act.

Much could be said in its favour if the debt was a debt of the father alone for which the sons were also liable under the Hindu law theory of pious obligation as then their liability would be entirely dependent and derivative. But where as in this case the debt was borrowed for family necessity by the father in his capacity as managing member of the family, the sons are liable equally with the father for

*S. A. No. 524 of 1942. 20th January, 1943.

the debt not because there is any pious obligation on their part to discharge the debt borrowed by the father but because as members of the joint family the debt borrowed for necessity is as much binding against them as against the borrower. It is true that the liability of the sons is limited to the joint family assets in their hands and they are not personally liable as the father is. But it is equally true that the debt is as much theirs as that of the father, and it is so because in the eye of the law a debt borrowed for family necessity is binding against them of its own force apart from the fact that the father created the debt. To such a case, the principle that the son alone cannot be sued during the father's lifetime will not in my opinion apply. Further, there has been a partition in the family since the debt was created and the father and sons are now divided members as stated by the District Munsiff.

I am not able to see any reason why when the facts are as stated, the mere circumstance that the father has applied to the Board for a conciliation of this particular debt should be regarded as a bar to the entertainment of the present suit. "The matter pending before the Board"—to use the language of section 19—is the matter of the debt due by father. It does not relate to the liability of the sons for the debt, though the debt may be one and the same for which the father and the sons are all equally liable. It is not pretended that if three independent persons unrelated to each other as members of a joint Hindu family borrowed a debt and one of them alone went before the Board with a conciliation application a suit could not be filed by the creditor against the other two. There is no distinction between such a case and the present one because, as pointed out already, the obligation of the sons arose by reason of the fact that the debt was contracted for family necessity and not merely because they are under a pious duty to discharge their father's debt.

The defendants admit execution of the promissory note and the amount due as claimed and the only plea they have raised is this alleged bar under section 19 of the Debt Conciliation Act. As this plea has now been overruled, the plaintiff is entitled to a decree against defendants 2 and 3 for the amount claimed as prayed for in the plaint with costs, their liability being limited to the joint family properties or assets in their hands. The dismissal of the suit against the first defendant has not been challenged in this second appeal and will stand.

Though the point is rather a novel one and is not governed by any direct decision, still having regard to the fact that the liability is admitted and nearly six years have elapsed since the promissory note was executed, I have made up my mind to refuse leave.

K.C. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WADSWORTH.

Mantripragada Sivaramayya .. *Appellant**

v.

The Official Receiver of West Godavari and others .. *Respondents.*

Madras Agriculturists' Relief Act (IV of 1938), section 19—Provincial Insolvency Act (V of 1920), sections 19 (2) and 62—Dividend declaration—Date of—Sanction of Court whether essential before notice to creditors regarding the declaration of dividend—Application for scaling of debt whether maintainable.

An Official Receiver on the 21st March, 1938, definitely declared a dividend due under the insolvency of the appellant to the proved creditors, after making the calculations contemplated in section 62 of the Provincial Insolvency Act, and he then proceeded to work out a distribution statement and sent notice also to the creditors, presumably in compliance with rule 19 (2) of the Act, although strictly speaking the notice should have been issued only after the distribution of the dividend had been sanctioned by the Court. On the question whether the dividend should be deemed to have been declared on the 21st March before Act IV of 1938 came into force,

Held, that the dividend should be deemed to have been declared on the 21st of March, 1938, before Act IV of 1938 came into force; that the appellant (insolvent) was not entitled therefore to the benefit of the Act and hence the application for scaling down the debts under section 19 was not maintainable.

---

*A. A. O. No. 449 of 1941; C. R. P. Nos. 2193 of 1940 and 471 to 473 of 1941 and 508 to 515 of 1941. — 5th February, 1943.

Appeal against the order of the District Court of West Godavari at Ellore dated 10th December, 1940 and made in I. P. No. 37 of 1932, approving the schedule of dividends in the said I. P. No. 37 of 1932.

C. V. Dikshitulu for Appellant.

B. V. Ramanarasu and *V. Suryanarayana* for Respondents.

The Court delivered the following

JUDGMENT.—These matters all arise out of the same insolvency. The civil miscellaneous appeal is preferred against the order approving the schedule of creditors and sanctioning the distribution of the dividend. The two sets of civil revision petitions are against two sets of applications under section 19 of Madras Act IV of 1938 by the same insolvent, one of which was before the District Judge and the other before the District Munsiff of Ellore. All the applications under section 19 were dismissed.

The appellant was adjudged an insolvent on 1st October, 1934. On the 21st March, 1938, the Official Receiver approved a statement which contained the schedule of creditors, the rate of dividend declared and the amount of dividend due to each of the creditors. On the same date he issued a notice to all the proved creditors requiring them to make their objections, if any, within one week. The insolvent on the same day, 21st March, 1938, presented an application to the District Judge in which he prayed for stay of proceedings in the insolvency in anticipation of the passing of Madras Act IV of 1938 under which he hoped to get relief. Act IV came into force on 22nd March and on the 26th March, the insolvent filed a fresh application to the District Judge for stay of proceedings. Neither of these two applications quoted any provision of law under which stay could be properly granted. Nevertheless stay was ordered by the District Judge on 4th April, 1938. It could only have been ordered under the Court's inherent jurisdiction. No specific provision is however quoted nor does the order say up to what time the stay will operate. The prayer of the insolvent was for stay until he had filed his application under Act IV, and had paid off his creditor. Presumably, the intention of the District Judge was to stay proceedings only until orders had been passed on the anticipated applications under Act IV.

After the stay had been ordered the insolvent filed two sets of applications under section 19 of Act IV of 1938, one before the District Judge and the other before the District Munsiff to scale down the decrees in favour of his creditors. He did not implead the Official Receiver in any of these applications as he should have done; nor did he take any action to get the non-decree debts scaled down under Act IV. The applications to the District Judge were dismissed on the 26th October, 1940, and the applications to the District Munsiff were dismissed on the 6th November, 1940, on the ground that a dividend had been declared before the passing of the Act so that section 21 of Act IV would have no application. On the date of the dismissal of the application by the District Munsiff the Official Receiver declared a further dividend and both the distribution statements were submitted to the District Judge for sanction. The actual stay order seems to have been formally vacated on 3rd December, 1940. On the 10th December, 1940, the dividends were approved.

It is contended by the appellant, who is also the petitioner in the civil revision petitions, that the act of the Official Receiver on the 21st March, 1938, did not amount to the declaration of a dividend, so as to bring into force the operation of the first portion of section 21 of Act IV of 1938 which runs as follows:

> "Nothing contained in this Act shall apply to the debts payable by any person who has been adjudicated an insolvent, if prior to the coming into force of this Act, a dividend has been declared out of his assets."

The power to frame a schedule of creditors under the Provincial Insolvency Act has, by rule, been delegated to the Official Receiver. By rule also the Official Receiver is required to obtain the sanction of the Insolvency Court before distributing a dividend. Rule 19 of the rules under the Provincial Insolvency Act says "No dividend shall be distributed by the receiver without the previous sanction of the Court." The same rule requires notice that the distribution of a dividend has

been sanctioned to be sent by the receiver. Apparently, in this case, the notice which under the rules is strictly to be sent after the sanction has been obtained, was in fact sent as soon as the schedule had been framed and the dividend had been calculated by the receiver, before the Court's sanction was obtained.

It is contended for the appellant that there is no declaration of the dividend until the sanction of the Court has been obtained for its distribution. Under section 59, it is the receiver who is to distribute the dividend. Under section 62, it is the receiver who is to calculate the dividend and the manner in which it should be calculated is laid down in that section. Section 63 provides for what is to be done in the case of a belated proof by a creditor and it is provided that a creditor who has not proved his debt before the declaration of any dividend shall be entitled to be paid out of any money in the hands of the receiver before that money is devoted to any future dividends, but he shall not be entitled to disturb the distribution of any dividend declared before the proof of his debt. This section makes a clear distinction between the process of declaration and the process of distribution and it seems to me obvious that whereas the declaration of the dividend will be a single definite act, the distribution of the dividend will be a series of acts probably spread over a considerable period of time according to the accessibility of the creditors. That presumably is the reason why the criterion adopted under section 21 of Act IV of 1938 is the declaration of the dividend and not the distribution thereof. It appears from section 64 which deals with the final dividend that the declaration of the dividend is a thing to be done by the receiver. Here again, the Madras rule would require the Court's sanction before distribution takes place. But there is nothing, so far as I have been able to gather, either in the Act or the rules which makes the Court's sanction necessary before the dividend is declared.

As I understand it, the process of declaration is the process contemplated in section 62. That is to say, the Official Receiver totals the proved debts, totals the debts likely to be proved and the money required for the expenses of administration, and retains the amount necessary for future contingencies and then the balance is allotted rateably to the total of the proved debts and this ratio is the basis on which the dividend is declared. When this dividend has been so declared a further process of allotting the amount individually between the creditors who have proved, has to be carried out and it is this distribution statement which requires the sanction of the Court before any disbursement is made. It is not, so far as I can gather, necessary that the actual declaration of the dividend should receive the sanction of the Court before it could be said to be complete. The form authorised has a column which states " dividend declared in the rupee " and another column " dividend due to each creditor ". The declaration of the amount in the rupee of the dividend is a preliminary process to the calculation of the amount due to each creditor.

It seems to me on the facts of this case that on the 21st March, 1938, the Official Receiver did definitely declare a dividend due under the insolvency to the proved creditors after making the calculations contemplated in section 62. He then proceeded to work out a distribution statement and he sent a notice to the creditors which must, presumably, have been intended to comply with rule 19 (2) of the Act, although strictly speaking the notice should have been issued after the distribution of the dividend had been sanctioned. The fact that he issued this notice prematurely would not, in my opinion, detract from the completed character of the declaration of dividend. It seems to me, therefore, that there was dividend declared on the 21st March, 1938, before Act IV of 1938 came into force. The insolvent is therefore not entitled to the benefits of the Act with reference to the debts under the insolvency. The applications under section 19 were rightly rejected and there is no reason to set aside the Insolvency Court's order for the distribution of the dividends. The civil miscellaneous appeal and the civil revision petitions are, therefore, dismissed with costs, two sets in civil miscellaneous appeal No. 449 of 1941 and one set in each of the Civil Revision Petitions Nos. 2193 of 1940, 471 of 1941, 473 of 1941 and 509 of 1941.

K.C. *Appeal and petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

D. Ramachandra Ayyar .. *Petitioner**

v.

K. Sesha Aiyangar .. *Respondent.*

Civil Procedure Code (V of 1908), section 60 (1) (b)—Cooking vessels with which a hotel-keeper prepares sweetmeats—If tools of an artisan exempt from attachment.

The word 'artisan' is synonymous with 'handicraftsman' or 'mechanic' and is used in its ordinary sense as a man who uses tools.

The cooking vessels with which a hotel-keeper prepares sweetmeats are not tools of an artisan within the meaning of section 60 (1) (*b*) of the Civil Procedure Code and they are not exempt from attachment.

Mahabir v. *Raghunandham,* A.I.R. 1935 All. 848 and *Bindeshri* v. *Banshilal,* (1931) I.L.R. 54 All. 399, dissented from.

Manickam v. *Manikyamma,* (1941) 2 M.L.J. 671, applied.

In any event the hotel-keeper cannot claim exemption from attachment of the vessels used by his employee in the preparation of food which he sells to the public as the employee is not the judgment-debtor.

Petition under section 25 of Act IX of 1887, praying that the High Court will be pleased to revise the order of the Court of the District Munsiff of Ariyalur dated 20th August, 1942, and made in E. A. No. 408 of 1942 in S. C. S. No. 50 of 1941.

K. S. Desikan for Petitioner.

N. Suryanarayana for Respondent.

The Court delivered the following

JUDGMENT.—The respondent is a hotel-keeper and the question is whether the vessels with which he prepares sweetmeats are tools of an artisan within the meaning of section 60 (1) (*b*) of the Civil Procedure Code which are exempt from attachment. The lower Court held they were.

The word "artisan" has a well-recognised meaning and is roughly synonymous with "handicraftsman" or "mechanic." The three artisans mentioned in the Hereditary Village Offices Act, namely, blacksmith, carpenter and potter, are examples of what is ordinarily understood by the term "artisan," although they undoubtedly do not exhaust the class of artisans. The use of the word "tool" in section 60 (1) (*b*) is also an indication that the word "artisan" is used in its ordinary sense as a man who uses tools. If we give an extended meaning to "artisan" to include persons not ordinarily regarded as artisans, then it becomes necessary to give an extended meaning to "tools" also and to regard as tools things which are not commonly understood as such. Cooking vessels are certainly not tools in the ordinary sense of the word.

In *Manickam* v. *Manikyamma*[1], Happell, J., has discussed this question fully in considering whether musical instruments used by a professional musician can be regarded as the tools of an artisan ; and I completely agree with all that the learned Judge has said on this point. If we apply the reasoning of Happell, J., to the case under consideration it would follow that cooking utensils used by a sweetmeat seller are not tools of artisans. With respect, I find myself unable to agree with the conclusions drawn in *Mahabir* v. *Raghunandham*[2] and *Bindeshri* v. *Banshilal*[3].

Moreover, even a tool used by an artisan is not always the subject of exemption under section 60 (1) (*b*) of the Code unless the artisan is the judgment-debtor himself. If a person employs a number of artisans to work for him and gives them tools for that purpose, he is not himself an artisan but an employer of labour who would not be entitled to the benefit of the section. So that even if a person who prepared sweetmeats were an artisan, one who employs others to do so would not be an artisan. A hotel-keeper cannot claim exemption from attachment of the vessels used by his employees in the preparation of food which he sells to the public.

---

*C. R. P. No. 1523 of 1942. 1st March, 1943.

1. (1941) 2 M.L.J. 671.
2. A.I.R. 1935 All. 848.
3. (1931) I.L.R. 54 All. 399.

The petition is allowed with costs and the execution petition filed by the petitioner in the lower Court ordered to proceed.

K.S. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

The Bezwada Municipal Council, represented by Mr. C. Narasimham, the Commissioner of Bezwada Municipality .. *Appellant** (*Defendant*)

v.

Seethepalli Venkata Nagabhushanam .. *Respondent* (*Plaintiff*).

Madras District Municipalities Act (IV of 1884), section 147 and by-laws under Madras Act (V of 1920) —Water supply—Meter—If work necessary for such supplies—Cost of repair—Liability of house-owner.

The owner of a house entered into an arrangement with the Municipality for the supply of water to his house. In accordance with the provisions of section 147 of the District Municipalities Act (IV of 1884) the meter was supplied by the owner of the house. On a question whether the owner of the house was liable to the Municipality for the repairs of the meter,

Held, that the meter was a " work necessary for such supplies" within the meaning of section 147 (4) of the old Act and the owner of the house was liable for the cost of repair of the meter though it may not be a work necessary for the supply of water.

Even if the old section 147 (4) does not apply and the contract for supply of water to the house-owner is now governed by the later Act (Madras Act V of 1920), the house-owner is responsible under the by-laws thereunder to the Municipality for the cost of any repairs carried out by the Municipality to his meter. It is not inconsistent with sections 129 to 131 of the new Act to pass a by-law that the repairs of a meter should be carried out by the Municipality at the expense of the owner of the house.

Appeal against the decree of the Court of the Subordinate Judge of Bezwada, dated 23rd September, 1941, in A. S. No. 166 of 1940 preferred against the decree of the Court of the District Munsiff of Bezwada dated 18th July, 1940, in O. S. No. 631 of 1939.

A. Lakshmayya for Appellant.

M. Appa Rao for Respondent.

The Court delivered the following

JUDGMENT.—The respondent entered into an arrangement with the Municipality of Bezwada for the supply of water to his house. In accordance with the provisions of section 147 of the old District Municipalities Act (IV of 1884), the meter was supplied by the respondent; and the question that arises in this appeal is whether he is liable to the Municipality for the repairs of the meter. The Courts below held that he was not.

Various points were raised on behalf of the Municipality by Mr. Bhimasankaram for the appellant, but I think the only point worth discussion is whether under the terms of section 147 the respondent is legally liable for repairs carried out by the Municipality. Section 147 (4) says,

" The works necessary for such supplies and all future repairs . . . . . shall, in every case be carried out by the Chairman, or under his orders, and the expense thereof shall be defrayed by such owner or occupier."

So the question is whether a meter is a work necessary for " such supplies." The respondent has in his favour the interpretations given by the Government on two occasions in which they held, and rightly so, that a meter was not a work necessary for the supply of water. But section 147 (4) does not make the owner of the house liable only for the works necessary for the supply of water but for " such supplies "; and the meaning of " such supplies " is to be gathered from a reading of section 147 (1), by which " the Chairman may . . . . arrange for supplying water . . . in such quantities as the Chairman deems reasonable . . . ." So the Chairman has to arrange for the supply of such quantities of water as he deems reasonable and he cannot arrange for the supply of a certain quantity of water unless there is a meter to measure that water. It follows that the meter is a work necessary for such supplies within the meaning of section 147 (4).

*S. A. No. 92 of 1942. 8th March, 1943.

The learned advocate for the respondent however here contends that section 147 (4) does not now apply; because the supply of water to the respondent is now governed by the new Act (Madras Act V of 1920) and the contract under section 147 of the old Act is no longer in force. If that is so—and I think that the learned advocate for the respondent is right—then we have to see whether under Act V of 1920, and the rules thereunder, any liability can be imposed on the respondent to pay the Municipality for repairs carried out by it. There is no section directly imposing such a liability; but under section 306 (3) (*e* and *g*) the Council is authorised to make by-laws, not inconsistent with the Act or with any other law, (*e*) for the supply of water for domestic consumption and use and (*g*) for the measurement of water. Although sections 129 to 131 of the Act, which deal with the supply of water for domestic use, make no direct reference to repair of meters, section 131 (1) permits the Municipality to arrange in accordance with the by-laws to supply water for domestic consumption and use. It is not inconsistent with sections 129 to 131 to pass a by-law that the repairs of a meter should be carried out by the Municipality at the expense of the owner of the house. The by-laws printed as Ex. VI, clause 4 (*f*) provide that, "In cases where the meter is provided by the owner or occupier the cost of repairs whenever found necessary shall be met by him." The house-owner is therefore responsible to the Municipality for the cost of any repairs carried out by the Municipality to his meter. The learned Subordinate Judge seemed to be of this opinion; but he thought that as the Government had interpreted the older Act otherwise, and as there had been several decisions to the contrary, he should give a finding in accordance with the other legal decisions and the Government's interpretation even though they were not binding on him. A Court is however bound to decide any question raised before it according to what it considers to be the law; and so the Subordinate Judge should have allowed the appeal of the Municipality if he thought that it was entitled in law to claim the cost of repairs from the owner.

The appeal is allowed with the costs of the Municipality throughout.

The respondent has filed a memorandum of cross-objections with regard to the order as to costs. That is dismissed, but under the circumstances without costs. (Leave to appeal is refused.)

K.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Kissan Singh and others .. *Petitioners** (*Accused*).

Defence of India Rules (1939), rules 38 (5) and 34 (6) (e) and (k)—Pamphlet prejudicial to prosecution of war—Moderate language—Accused to be given benefit of doubt in the circumstances.

Where the accused were convicted on a charge of making a prejudicial pamphlet punishable under rule 38 (5) of the Defence of India Rules read with rule 34 (6) (*e*) as the lower Court felt that the pamphlet might well prejudice the prosecution of the war,

Held, that the pamphlet was on the whole moderate and more reasonable than much of what appears in the daily papers, and hence the petitioner should have been given the benefit of doubt and acquitted.

Niharendu Dutt Majumdar v. *King-Emperor*, (1942) 5 F.L.J. 47 : 55 L.W. 344 (F.C.), referred to.

Held, further, that if the accused could not be convicted of a prejudicial act within the meaning of rule 34 (6) (*e*) it was difficult to see how they could be convicted under rule 34 (6) (*k*).

Petition under sections 435 and 439 of the Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of Session, Coimbatore, dated 29th January, 1943, in C. A. No. 9 of 1943, preferred against the order of the Court of the Additional First Class Magistrate, Coimbatore, in C. C. No. 22 of 1942.

M. L. Nayak for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

---

*Cr. R. C. No. 150 of 1943. 5th March, 1943.
(Cr. R. P. No. 129 of 1943).

The Court made the following

ORDER.—This petition relates to a pamphlet written by the first accused and signed by the second and third accused. The fourth accused in the lower Court was the printer. All the accused were convicted. The fourth accused, who was sentenced only to pay a fine did not appeal to the Sessions Judge. The other three accused appealed, but their appeal was dismissed. They are the petitioners in this Court.

The charge against the petitioners was that of making a prejudicial pamphlet punishable under rule 38 (5) of the Defence of India Rules read with rule 34 (6) (*e*). The pamphlet purports to be addressed to the workers of Coimbatore. It begins by referring to the repressive measures taken by the Government all over the country, to lathi charges, and to an incident in Coimbatore where fire was opened on some mill workers resulting in the death of some of them. The pamphlet urged a non-official enquiry, and increase in wages, and other concessions, including payment of compensation to the relatives of the persons who were shot dead. The pamphlet then goes on to indulge in a political discussion of the Government's repressive measures all over the country, to the imprisonment of the leaders of the Congress Party—the Congress being described as the country's life nerve. It stresses the necessity for the formation of a national Government to wage war against Fascist Japan. So far the pamphlet cannot be said to be very objectionable for it sets out with moderation and restraint only what can be seen almost daily in a more virulent form in the press. Later on, the pamphlet goes on to say that the reason why the Government is afraid to introduce a national Government is that the national army which would drive away Fascist Japan would then turn round and destroy the Government. It urges the workers to return to work and unite in demanding a national Government for the prosecution of the war and the turning out the present Government.

The petitioners were charged under rule 34 (6) (*e*) of the Defence of India Rules for an act intended or likely " to bring into hatred or contempt or to create disaffection towards . . . . the Government established by law in British India . . . ." The pamphlet would no doubt come within this sub-clause if it were strictly construed ; but the learned appellate Judge found it difficult to uphold the conviction under that clause because of the decision of the Federal Court in *Niharendu Dutta Majumdar* v. *King-Emperor*[1], in which it was said that every irresponsible talk " cannot be treated as a prejudicial act likely to bring into hatred or contempt or to excite disaffection towards His Majesty or the Crown representative or the Government established by law in British India." The principle laid down in that decision—as in many others—is that reasonable criticism of the Government is permissible, provided that it does not transgress certain bounds. It was not the intention of the Act to stifle reasonable criticism of the Government intended to bring about by constitutional means what the writers believed to be beneficial. If rule 34 (6) (*e*) were strictly construed, then any criticism of the Government would be punishable. The learned Sessions Judge, while referring to the judgment of the Federal Court above referred to, thought that the speech might well prejudice the prosecution of the war. Undoubtedly it would, as all adverse criticism of the Government is likely to do ; but if the accused could not be convicted of a prejudicial act within the meaning of rule 34 (6) (*e*), it is difficult to see how they could be convicted under rule 34 (6) (*k*) ; for the ground for convicting them under rule 34 (6) (*k*) would be because criticism of the Government was likely to excite disaffection against it. As the pamphlet was on the whole moderate and more reasonable than much of what is published in the daily papers, I think the petitioners should have been given the benefit of doubt and acquitted.

The petition is allowed, the conviction set aside, and the release of the petitioners ordered.

K.C. ——— *Conviction set aside.*

---

1. (1942) 5 F.L.J. 47 : 55 L.W. 344.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMAYYA.

Annakutty Moothan's sons Maniappa Moothan and others .. *Appellants** (*Defts.*)

v.

Ullattil Gopalan Nayar and another .. *Respondents* (*Plff.-Respts.*).

Malabar Tenancy Act (XIV of 1930), section 3, clause (x)—Ubhaya Pattom—Meaning.

In Malabar " Ubhaya Pattom " is rent payable on rice fields.

Sundara Ayyar's Malabar Law and Moore's Malabar Law, relied on.

Appeals against the decrees of the District Court of South Malabar in A. S. Nos. 417 and 424, and 454 and 496 of 1939 respectively preferred against the decrees of the Court of the Subordinate Judge of Ottapalam in O. S. No. 73 of 1936 and O. P. No. 33 of 1938 respectively.

P. S. Narayanaswami Ayyar for Appellants.

C. Unikanda Menon and *K. P. Raman Menon* for Respondents.

The Court delivered the following

JUDGMENT : *S. A. No. 1145 of 1941.*—After hearing exhaustive and elaborate arguments on the meaning to be attached to the several Malayalam expressions used in Ex. F-1 and other documents, I see no reason to differ from the conclusion arrived at by the learned District Judge. The Subordinate Judge no doubt took a different view but having had the benefit of the full arguments and after consulting the dictionaries I have no hesitation in saying that the District Judge is right.

The sole question for decision is whether land of 110 paras of seed covered by Ex. F-1 was dry land converted into wet land within section 5 of the Malabar Tenancy Act. Wet land is, for the purposes of that Act, land which is adapted for the cultivation of paddy—*see* section 3, clause (*x*). Dry land is defined by section 3, clause (*d*) as land which is neither a wet land nor a garden land. We are not concerned with ' garden land ' in this case.

Under section 5 of the Act in the case of a dry land converted into wet by the tenant's labour, the fair rent is less than what it is in cases of other wet lands not falling within section 5. The quantum of a fair rent determines the amount payable for a renewal. In this case the appellant who is a customary verumpattamdar applied for ' renewal ' and was granted renewal. In fixing the sum payable by him, the question arose as to what was the fair rent and that again depended upon the question whether certain area covered by Ex. F-1 was dry land converted into wet by the tenant's labour.

This area of 110 paras of seed area is admittedly part of a larger area of 220 paras of seed area. Under Ex. F-1 this extent of 220 paras of seed area which is described as ' Ubhayam ' and some other land described in the same sentence as ' paramba ' were all leased. An extent of 110 paras of seed area is said to be on a higher level. The tenant is asked to bring that into good condition by digging it, *i.e.*, by reducing the level.

The expression ' paramba ' is admittedly a dry land. The contrast in the same sentence is significant. The suit land is described as ' Ubhayam ' and another land as ' paramba.' The meaning of the expressions used in connection with what the tenant is asked to do regarding this land is the subject of acute difference between the learned advocates who appeared before me. But the chief question as one of the learned advocates for the appellants put before me is whether the disputed area was at the time of Ex. F-1 adapted for the cultivation of paddy. The expression " Ubhaya Pattom " is defined in Mr. Sundara Ayyar's Malabar Law and in Moore's Malabar Law as meaning ' rent payable on rice fields.' ' Pattom ' is rent. Both the learned authors use the word ' Ubhayam ' as a ' rice field.' That means that the field was adapted for paddy cultivation. The meaning to be attached to ' Ubhaya Pattom ' is not disputed by the learned advocates for the appellants ;

*S. A. Nos. 1144 and 1145 of 1941. 12th March, 1943.

but they urge that the word 'Ubhayam' by itself does not mean a rice or paddy field.

It may be that the etymological meaning of the expression 'Ubhayam' or 'Nilam' which is also used for the suit land in Ex. F-1 is merely 'land.' But what is the meaning in which they are used in agricultural leases? The dictionaries give both the meanings but the question is how they are used in leases and other transactions dealing with land. After giving the matter my careful consideration, I think we ought to be guided by what has been said by Mr. Sundara Ayyar and Mr. Moore in their works on Malabar Law.

In the result, I agree with the lower appellate Court and dismiss the second appeal with costs.

S. A. No. 1144 of 1941.—In this case the question is only one of costs. I do not see any reason to interfere with the discretion exercised by the lower appellate Court. This second appeal is also dismissed; no costs in this Court.

No leave.

K.S. — *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Pulloor Kuttikat Manakkal Vasudevan Nambudiri's son, Karnavan and Manager, Vasudevan Nambudiri .. *Appellant**

v.

Kappil Nallannampra Puthiya Kovilakath Manavikraman *alias* Valia Thirumalpad and others .. *Respondents.*

Madras Agriculturists' Relief Act (IV of 1938), section 10 (2)(1)—Mortgage with possession with a counter-part by mortgagee—Balance mentioning a rate of interest in calculating the purappad—If takes the transaction out of the scope of section 10 (2) (1).

The terms of a mortgage were embodied both in a mortgage document and in a counter-part executed by the mortgagee which recited: "And it is further agreed that I should pay 230 paras of paddy therefor valued at Rs. 143-12-0 and Rs. 10 out of the total pattam of 1,560 paras of paddy and Rs. 20 deducting therefrom 1,200 paras of paddy as interest for the kanom amount of Rs. 10,000 at the rate of 12 paras of paddy per hundred paras and the sum of Rs. 65-0-5 which has been agreed to be paid as assessment and for which 130 paras of paddy has been allowed to be appropriated making a total of 1,330 paras in all, and also a sum of Rs. 10 allowed for the protection and upkeep of the items 23 and 24." The document also stipulated for the redemption of the property after receiving "the mortgage amount" and contained a clause whereby the mortgagor agreed to pay any enhanced assessment that may be imposed and if he defaulted and the mortgagee had to pay it, that was to be adjusted towards the purappad payable to the mortgagor and if that was found insufficient, added to the mortgage amount payable. On the question whether the contract was one under which a rate of interest is stipulated as due to the mortgagee so as to take it out of the exception in section 10 (2) (1) of Madras Act IV of 1938,

Held, that although the document recites a rate of interest as part of the calculation of the rate of purappad it is not a document which stipulates a rate of interest as due to the mortgagee; nor is the realisation of the produce by the mortgagee under the terms of the document a payment of interest by the mortgagor such as might be taken into account under section 8 (2) and (3) of Madras Act IV of 1938.

Appeal against the order of the Court of the Subordinate Judge of South Malabar at Calicut dated 10th September, 1940 and made in O. P. No. 80 of 1939.

K. Kuttikrishna Menon for Appellant.

P. Govinda Menon for Respondents.

The Judgment of the Court was delivered by

Wadsworth, J.—This appeal arises out of an application made under the rules framed under Madras Act IV of 1938 to fix the amount payable in respect of a mortgage document. The appellant here is the creditor. The mortgage in question is one of September, 1917, and its terms were embodied both in a mortgage document and in a counter-part executed by the mortgagee which is Ex. B. The argument has proceeded on the basis of the recitals in Ex. B. The document is very long

*A. A. O. No. 500 of 1941. 5th January, 1943.

and involved but the essential recitals are as follows :

"And it is further agreed that I should pay 230 paras of paddy therefor valued at Rs. 143-12-0 and Rs. 10 out of the total pattam of 1,560 paras of paddy and Rs. 20 deducting therefrom 1,200 paras of paddy as interest for the kanom amount of Rs. 10,000 (rupees ten thousand) at the rate of 12 paras of paddy per hundred paras and the sum of Rs.65-0-5 which has been agreed to be paid as assessment and for which 130 paras of paddy has been allowed to be appropriated making a total of 1,330 paras in all, and also a sum of Rs. 10 allowed for the protection and upkeep of the items 23 and 24."

The document also stipulates for the redemption of the property after receiving "the mortgage amount" and it contains a clause whereby the mortgagor agrees to pay any enhanced assessment that may be imposed and if he defaults and the mortgagee has to pay it, this is to be adjusted towards the purappad payable to the mortgagor and, if that is found insufficient, added to the mortgage amount payable. The lower Court has treated this as a contract under which a rate of interest is stipulated as due to the mortgagee so as to take it out of the exception in section 10 (2) (*i*) of Madras Act IV of 1938 and has also treated the amounts received by the mortgagee according to the calculations in the document as payments made by the mortgagor and has scaled down the mortgage applying section 8 (2) and (3) of the Act.

Ignoring for the present the detailed criticisms of the lower Court's order, we have first to consider whether this contract is one under which a rate of interest is stipulated as due to the mortgagee and whether in fact anything at all has been paid to the mortgagee for interest or principal so as to make applicable the provisions of section 8 (2) and (3) of the Act. For the respondents our attention has been drawn to a decision of the Full Bench of the Allahabad High Court, *Mohamad Ishaq* v. *Rup Narain*[1] as authority for the proposition that where the income from the mortgaged property is allocated on the basis of an estimated yield, a certain portion thereof being allowed towards interest and the balance disposed of in various ways, the mortgagee will necessarily be accountable for any surplus income derived owing to an increase of the yield over the estimate adopted on the calculations. We do not read this decision as laying down any general rule to that effect. On the facts of that case, there was a clear stipulation by the mortgagor to pay a fixed amount as interest. It was originally to be met out of a certain portion of the income and as to the balance by means of a cash payment. When the yield increased, the cash payment was dropped by tacit agreement of parties. The learned Judges applied section 76 (*h*) of the Transfer of Property Act and held that section 77 would not apply because there was no contract, express or implied, between the mortgagee and the mortgagor that the receipts of the mortgaged property should be taken in lieu of interest. The document with which we deal is a very different document from that which was before the learned Judges of the Allahabad High Court. It seems to us that the rather involved language in which the amount of purappad payable by the mortgagee is stipulated, is intended to do no more than set forth the way in which this purappad has been calculated, and we do not think that from the language of this document, it can be inferred that the mortgagor was to be liable to pay any rate of interest or that the mortgagee was to account for any surplus over the interest in calculation in the passage just referred to. Such recitals are very common in documents from Malabar. It is the normal practice in drawing up such documents to take an estimated yield, adjust it in various ways and arrive at a balance to be payable as purappad or surplus produce by the mortgagee to the mortgagor. The only peculiarity of the present document is that instead of saying that so much shall be taken by the mortgagee as interest or profits, it works out this amount on the basis of an expressed rate. Clearly, however, there was no intention to make the mortgagor liable to pay this rate of interest ; nor was there any intention to limit the profits of the mortgagees to this rate of interest. Had there been such an intention the passage relating to the payment of excess land revenue could not have been drafted in the form given to it. The stipulation that any excess land revenue which the mortgagee may have to pay shall be adjusted

1. A.I.R. 1931 All. 562.

against the purappad or, if that is found insufficient, shall be added to the mortgage amount, clearly indicates that the mortgagee was not to be accountable for any surplus which he might realise owing to fluctuations in the yield. Nor was the mortgagor to be accountable for any deficiency in the rate of interest owing to bad seasons. We are, therefore, of opinion that this document although it recites a rate of interest, as part of the calculation of the rate of purappad is not a document which stipulates a rate of interest as due to the mortgagee ; nor is the realisation of the produce by the mortgagee under the terms of this document a payment of interest by the mortgagor such as might be taken into account under section 8 (2) and (3) of Madras Act IV.

In the result, therefore, we set aside the order of the lower Court and dismiss the application with costs here and in the Court below.

K.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KING.

Palaparthi Venkateswarlu .. *Petitioner**

v.

Palaparthi Audiseshayya and another .. *Respondents.*

Provincial Small Cause Courts Act (IX of 1887), section 32 (2)—Suit filed as original suit in Munsiff's Court—Court subsequently acquiring small cause powers—If makes decree in the suit a small cause one and therefore not appealable.

A suit on a claim for more than Rs. 100 was filed in the District Munsiff's Court as an original suit as the then District Munsiff had small cause powers extending only up to Rs. 100. When it came to be tried, though the Judge then presiding over the Court had small cause powers up to Rs. 300, he treated the case as an original suit and gave a decree. On the question whether an appeal lay from the decree,

Held, that a suit filed as an original suit must remain so until it is concluded and that once a suit has been filed as an original suit the party against whom the decree is passed must retain a right of appeal.

Dasrulala v. *Narayan,* I.L.R. (1937) Nag. 401, approved.

Kollipara Seethapathy v. *Kantipati Subbayya,* (1909) 20 M.L.J. 718 : I.L.R. 33 Mad. 323 (F.B.), distinguished.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the decree of the Court of the Subordinate Judge of Bapatla in A. S. No. 71 of 1939 preferred against the decree of the Court of the District Munsiff of Bapatla in O. S. No. 228 of 1936.

K. Krishnamurthy for Petitioner.

N. Subramanyam for Respondents.

The Court delivered the following

JUDGMENT.—This is a petition filed by the first defendant in O. S. No. 228 of 1936 on the file of the District Munsiff of Bapatla. That suit was filed at a time when the District Munsiff of Bapatla had small cause powers extending only to Rs. 100 and as the plaintiff's claim was for more than that sum it was filed as an original suit. When it came to be tried, however, in 1939, the Judge then presiding over the Court had powers up to Rs. 300. He appears however to have treated the case as an original suit and gave a decree for the plaintiff. Against this decree the first defendant appealed to the learned Subordinate Judge of Bapatla. A preliminary objection was raised by the plaintiff that no appeal lay on the ground that the suit was one of a small cause nature. The learned Subordinate Judge upheld this preliminary objection, relying upon a Full Bench decision, *Kollipara Seethapathy* v. *Kantipati Subbayya*[1] and dismissed the appeal. It is against this order dismissing the appeal as not competent that the present petition has been filed.

It is quite clear that the facts in *Kollipara Seethapathy* v. *Kantipati Subbayya*[1] are different from the facts before me. That was a case in which it was agreed by both sides that the suit was a small cause suit from the moment of its institution. In the

*C. R. P. No. 1326 of 1942. 1st April, 1943.

1. (1909) 20 M.L.J. 718 : I.L.R. 33 Mad. 323 (F.B.).

present case it is clear that when instituted the suit was an ordinary original suit. In support of the petition I have been referred to the decision of Pollock, J., reported in *Dasrulala* v. *Narayan*[1]. He holds in that decision that if a suit is filed as an original suit it must remain an original suit even though the Court before which it was filed may acquire small cause powers or may transfer it to another Court with extended small cause powers. Reference is made by the learned Judge to section 32 (2) of the Provincial Small Cause Courts Act. That section gives no room for ambiguity on this point. It is quite clear that a suit which is filed as an original suit must remain so until it is concluded, and that once a suit has been filed as an original suit the party against whom the decree is passed must retain a right of appeal. The decree of the learned Subordinate Judge is therefore set aside and the appeal before him restored to file, and he is directed to hear and dispose of it in accordance with law and the observations in this judgment. The first respondent must pay the petitioner's costs of this petition.

K.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PATANJALI SASTRI.

Taranata Bhatta .. *Appellant**

v.

Gopalakrishna Mallayya and another .. *Respondents.*

Indian Contract Act (IX of 1872), section 25 (1)—Contract to provide maintenance for a distant relation—No consideration—Nor mention of natural love and affection—Whether enforceable.

Where an agreement not supported by consideration but in writing and registered provided for payment of Rs. 100 every year as maintenance to the plaintiff who was the defendant's father-in-law's divided brother's wife, as it was impossible for her to maintain herself decently otherwise, on the question whether the contract was enforceable,

Held, that as the parties could not be said to stand in a near relation to each other within the meaning of section 25 (1) of the Contract Act, the claim of the plaintiff could not be enforced.

Niser Ahmed Khan v. *Rahmat Begum*, A.I.R. 1927 Oudh 146, distinguished.

Appeal against the decree of the Court of the Subordinate Judge of South Kanara in A. S. No. 632 of 1939 preferred against the decree of the Court of the District Munsiff of Karkal in O. S. No. 78 of 1935.

K. P. Sarvothama Rao for Appellant.

A. Narayana Pai for Respondents.

The Court delivered the following

JUDGMENT.—This second appeal arises out of a suit brought to enforce an agreement whereby the defendant (appellant) promised to pay Rs. 100 every year as maintenance to the second plaintiff. The first plaintiff is the assignee of the arrears which had fallen due before the assignment.

The defendant pleaded that the agreement was not supported by consideration and was therefore not enforceable. Both the lower Courts have held that there was no consideration to support the agreement but the suit was decreed on the ground that the agreement fell under section 25 (1) of the Indian Contract Act. Under that provision an agreement without consideration is enforceable if it is expressed in writing and registered and is made on account of natural love and affection between parties standing in a near relation to each other. The agreement in this case recites *inter alia* that the second plaintiff is the defendant's father-in-law's divided brother's widow and that as it was impossible for her to maintain herself decently otherwise and it would be respectable to maintain her " without detriment to prestige" the defendant promised to pay her the maintenance for her lifetime. No reference is made to natural love and affection between the parties but the defendant admitted in his evidence that he made the promise out of affection for the second plaintiff. The question however remains whether the parties can be said to stand in a near relation to each other. I have been referred to a number

1. I.L.R. (1937) Nag. 401.

*S. A. No. 885 of 1941. 22nd December, 1942.

of cases on this point of which the decision of the Oudh Chief Court reported in *Niser Ahmed Khan* v. *Rahmat Begum*[1] comes nearest to the facts of the present case. There a near relation was held to subsist between a promisor and his parents in law for the purposes of section 25 (1), but assuming that case to have been correctly decided, it seems to me that it does not assist the respondents as the relationship between the parties here is two steps more remote. I am clearly of opinion that these parties cannot be said to stand in a near relation to each other within the meaning of section 25 (1) of the Indian Contract Act and that the respondents' claim must fail.

The appeal is therefore allowed and the suit is dismissed with costs throughout.

Leave refused.

K.C. —— *Appeal allowed.*

[PRIVY COUNCIL.]

(On appeal from the High Court of Bombay).

PRESENT :—LORD THANKERTON, SIR GEORGE RANKIN AND SIR MADHAVAN NAIR.

The Ahmedabad Municipality .. *Appellant**

v.

The Secretary of State .. *Respondent.*

Municipality—Grant by Government—Only a bounty—Subsequent deductions—Recipient has no cause of action against Government for recovery of the deductions.

The primary education grant which may annually be made by the Government to a municipality is only a bounty and the Government can make deductions from the amount of whatever sums they like. The municipality has no cause of action to recover the sums so deducted.

Sir Thomas Strangman, K.C., Messrs C. Bagram and *U. Sen Gupta* for Appellant.

J. Millard Tucker, K.C. and *W. W. K. Page* for Respondent.

Their Lordships judgment was delivered by

SIR MADHAVAN NAIR.—This is an appeal from a decree of the High Court of Judicature at Bombay dated February 8, 1938, which reversed a decree of the First Class Subordinate Judge of Ahmedabad dated March 31, 1933, in favour of the plaintiff—the appellant before the Board.

The plaintiff is the Ahmedabad Municipality; and the defendant is the Secretary of State.

The question for decision is whether, in the circumstances mentioned below, the plaintiff is entitled to recover from the defendant sums of money amounting to Rs. 48,156-5-0 together with interest which were deducted by the Government of Bombay from grants for primary education made by them to the Ahmedabad Municipality, and during its supersession, to the Committee of Management.

The facts are not in dispute, and may be briefly stated : On March 9, 1920, the Government of Bombay sanctioned the grant of Rs. 4 lakhs to the plaintiff in connection with a scheme for the acquisition of building sites for primary schools. Two of the conditions of the grant were (1) that the building should commence within six months from the date the land was handed over to the Municipality and (2) that the Municipality should spend at least 4 lakhs on the buildings within 5 years from that date. No provision was made in the grant as regards interest which might be earned on the amount pending its application due to delay in acquiring land or for any other sufficient reason. The money was paid over to the Municipality on March 30, 1920. On February 6, 1922, the Municipality was superseded by the Government of Bombay, under section 179 (1) of the Bombay District Municipal Act, 1901, for 2 years ; and under clause (3) (*b*) of the section a Committee of Management was appointed to perform its duties during the period. As a consequence of the supersession, all the property of the Municipality vested in His Majesty. [*See* section 179, clause (3) (*c*)]. As the sum of 4 lakhs was not immediately spent, the whole or the unspent balance, was "either invested or

1. A.I.R. 1927 Oudh 146.

*P. C. A. No. 26 of 1941. 15th December, 1942.

placed on deposit in the bank" and earned interest. For the financial year 1921-22 a sum of Rs. 24,000 was earned, and for the next year, 1922-23, Rs. 18,000—the total interest for the years being Rs. 42,000. On January 26, 1923, the Government passed a resolution directing

"that the Government grant to the Ahmedabad Municipality for primary education payable in 1922-23 should be reduced by Rs. 24,000 or by the interest which actually accrued during 1921-22 on the advance building grant of Rs. 4 lakhs paid by the Government *whichever is greater*. Similarly in future years the interest which actually accrues in any year or 6 per cent. on the unspent balance of that year whichever is greater should be deducted from the Government grant of the following year."

In pursuance of the above resolution a sum of Rs. 42,000 was deducted by the Government from the educational grant to the Municipality for the year 1922-23. Similarly, sums of Rs. 2,000 and Rs. 4,156-5-0 representing interest on the unexpired balance of the 4 lakhs for the financial years 1924-25 and 1925-26 were deducted by the Government from a subsequent grant. The total sum thus deducted amounted to Rs. 48,156-5-0. It is this sum together with interest, amounting to Rs. 62,856-5-0, that is now claimed by the plaintiff in the suit.

In the plaint, various contentions were raised. Amongst others, it was pleaded, that the amount of 4 lakhs having vested in the Municipality by the grant, the interest accruing on it, or the unspent balance belonged to it in the absence of any reservation of the same in favour of the Government and that the recovery of the interest on the building grant was contrary to the terms of the grant and was not warranted by it. Though it was not so specifically stated in the plaint, the substantial plea urged by the plaintiff was that the Government by deducting from the grants for education, amounts equal to the interest on the advance for the building sites was in effect recovering the interest on the amount which they were not entitled to do, as the interest accruing to it belonged to the Municipality and not to the Government.

The defendant in his written statement contended that the interest on the grant for the building sites belonged to the Government and that the suit was barred by limitation. He also stated in paras. 10 and 11 as follows:—

"Para. 10. The amounts in suit were deductions from the Government grant to the primary education and not recoveries in the ordinary sense of the term.

"Para. 11. There was no legal obligation on the part of the Government to bear any portion of the costs of elementary education incurred by the Municipality. The grants are in the nature of bounties and the Municipality has no legal right to enforce their payment. Consequently the reduction of the grants by any amount was a matter entirely within the discretion of the defendant and furnishes no cause of action to the plaintiff."

As the issues framed in the case did not cover the point raised in the above two paragraphs, the defendant submitted to the Court that the following additional issue should be framed, *viz.*

"Whether the Municipality has any legal right to enforce payment of any grants for elementary education and whether any such reduction furnishes any cause of action to the plaintiff."

The First Class Subordinate Judge by his order dated February, 7, 1933, rejected the defendant's application on the ground that the issue asked for did not arise on the pleadings and that it changed the nature of the case.

The First Class Subordinate Judge held that the grant of 4 lakhs vested in the Municipality, that it carried with it the interest that might accrue on it, and that the Government had no right, since the Municipality was the owner of the interest, to make deductions from the primary education grant payable every year, on account of such interest. He also held that the question as to whether or no Government have the right to reduce the recurring amount of the primary education grant payable every year does not really arise in the case, as according to him

"the parties have all along proceeded on the basis that the Government claimed the interest on the grant in suit and the way he recovered it was by deducting so much money from the recurring grant payable for primary education."

On the question of limitation, the Subordinate Judge held that the suit was not barred having regard to section 10 of the Indian Limitation Act.

On appeal to the High Court the learned Chief Justice (with whom Wassoodew, J., agreed) set aside the decision of the Subordinate Judge and dismissed the plaintiff's

suit. The learned Judge agreed with the Subordinate Judge that the interest on the 4 lakhs or the unspent balance belonged to the Municipality; but he held that the plaintiff had no cause of action to maintain the suit. He pointed out what in fact was true that

"Out of the interest nothing at all has been paid to Government. The interest was received by the Municipality and it has always been retained by the Municipality."

In the course of his judgment he also observed that

"if Government choose to make no grant at all, they are at liberty to do so and if they choose to make a grant less a particular sum to which they consider they have a moral claim but to which they have no legal claim that cannot confer any right of action upon the recipient of the balance of the grant; and that is really the plaintiff's case."

Their Lordships find themselves in agreement with this view.

It is clear that the First Class Subordinate Judge failed to appreciate the true nature of the case. This may possibly be due to the fact that the defendant contended that the interest on the 4 lakhs belonged to the Government. However that may be, the position before the Board has been made clear by the admissions made by the counsel. Sir Thomas Strangman stated candidly that he cannot contend that the primary education grant annually made by the Government was not a bounty, while Mr. Tucker has with equal condour conceded that the Government cannot legally claim the interest on the 4 lakhs or the unspent amount. In their Lordships' view the legal position has been stated correctly by the learned counsel. If the position is that the annual primary education grant made by the Government is only a bounty, then it must follow that the Government can make deductions from the amount of whatever sums they like. This is the basis of their resolution dated January 26, 1923. The fact that the amounts of interest which had accrued during any period or would accrue in the future on the 4 lakhs or the unspent balance formed measures of the deductions to be made from the annual payments for primary education does not by any means show that it was the interest on the grant that the Government were seeking to deduct. The amounts of interest are but measures of the deductions and nothing more. The interest is there for the Municipality to collect, and as the learned Chief Justice has well pointed out, the interest was received by the Municipality and it has always retained it.

The First Class Subordinate Judge should have framed the new issue asked for by the defendant and considered the question whether the plaintiff had any cause of action to maintain the suit. Their Lordships hold, agreeing with the High Court, that the plaintiff has no cause of action; the question whether the suit is barred by limitation does not, therefore, arise for decision. The result is that the appeal fails and their Lordships will humbly advise His Majesty that it should be dismissed with costs.

Solicitors for Appellant: *Hy. S. L. Polak & Co.*

Solicitors for Respondent: *Solicitor, India Office.*

K.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SOMAYYA.

The Travancore National Bank Subsidiary Company, Ltd. (now in liquidation) by its Official Liquidator, R. Narasimhachari.. *Appellant**

v.

Tranabank Union, a partnership firm consisting of the employees of the Travancore National and Quilon Bank, Limited, now in liquidation and another .. *Respondents.*

Contract Act (IX of 1872), section 230 (3)—Unregistered union which cannot be sued—Contract by a member on behalf of—Liability of member who signed the contract—Other members cannot be sued.

Where a member of an unregistered union of the employees of a firm signed an agreement for and on behalf of the union, the union cannot be sued on the contract and therefore the person who signed the contract can be proceeded against by virtue of section 230 (3) of the Contract Act. The

*C. C. C. A. No. 8 of 1942. 12th March, 1943.

other members of the union cannot be sued and the procedure under Order 1, rule 8 of the Civil Procedure Code is not applicable to the case.

Appeal against the decree of the Principal City Civil Judge, Madras, in O.S. No. 900 of 1940.

V. K. Thiruvenkatachari for Appellant.

A. K. Pillai for Respondents.

The Court delivered the following

JUDGMENT.—This is an appeal against the decree of the City Civil Judge passed in O. S. No. 900 of 1940. The plaintiff is the Travancore National Bank Subsidiary Company, Limited (now under liquidation) represented by its Official Liquidator. The lower Court dismissed the suit which was one to recover the balance of subscription due in respect of two chits. The plaintiff-company was carrying on a chit fund business. Various chits were started from time to time. The first defendant is styled "Tranabank Union" which admittedly consists of the employees of the Travancore National and Quilon Bank, Ltd. (now in liquidation) and also of the plaintiff-company which is the Travancore National Bank Subsidiary Company. The first defendant subscribed for two chits and was the successful bidder of both the tickets at the auction held on the 4th January, 1938. A sum of Rs. 1,340 in cash was paid to the first defendant-company and an agreement was executed for the future instalments on the 10th January, 1938. This agreement was signed by the second defendant on behalf of the first defendant. Though the suit was filed against both the defendants, the present appeal is pressed only against the second defendant who is the second respondent in this appeal. We are not concerned with the claim against the first defendant. The second defendant was sought to be made liable on the ground that though he signed as an agent in Ex. A, the suit document, the case is one coming under section 230 (3) of the Contract Act for the reason that the principal though disclosed cannot be sued. This ground of liability is based upon the fact that the Tranabank Union is an unregistered union of the employees of the two companies. In such a case it is said that all the persons who were members of the Tranabank Union are liable under the contract. At any rate it is said that the persons who signed the document on behalf of that unregistered union are liable. The lower Court rejected the plaintiff's case and dismissed the suit. Hence this appeal.

The second defendant when affixing his signature to Ex. A expressly added the word "agent" to his signature. The document itself begins by saying that it was executed by the Tranabank Union which is called the borrower. So the document is executed by the Tranabank Union and it was signed by the second defendant as agent. It therefore clearly means that he signed it as the agent of the first defendant Union. It cannot therefore be said that he (second defendant) did not indicate in that document that he was signing only as the agent. I therefore agree with the City Civil Judge in holding that the second defendant cannot be made personally liable on the ground that when he signed his name, he did not say that he signed for the Tranabank Union. That he did so for and on behalf of the Tranabank Union is fairly clear from the document read as a whole.

The chief ground which was pressed before the lower Court was that the Tranabank Union cannot be sued and that therefore the second defendant was liable. This claim is covered by section 230, clause (3) of the Indian Contract Act. The lower Court declined to accept the plaintiff's contention that the Tranabank Union cannot be sued. After setting out a quotation from the evidence of the second defendant, the lower Court stated that it was clear from his evidence that the Tranabank Union was an association of the employees of the bank and the plaintiff-company, that is, the main Travancore National and Quilon Bank and the plaintiff-company, without a register of members, without subscriptions and that it had been disbanded. Then dealing with the contention that the Tranabank Union cannot be sued, the Judge said that it was not an illegal body and that it may be difficult, and indeed very difficult to hold that the Tranabank Union is a party which cannot be sued. He winds up the discussion by saying that it was

up to the plaintiff-company to find out who were the members of the Union and to take steps to have them properly summoned and indicated that possibly the procedure under Order 1, rule 8, Civil Procedure Code, may be adopted. The learned Judge here overlooked the fact that under the law an unincorporated body cannot be sued as such for recovery of a debt or on a contract. That the procedure under Order 1, rule 8 indicated by the City Civil Judge is inapplicable to a case of this kind has been laid down by Venkatasubba Rao and Abdur Rahman, JJ., in *Ratnaswami Nadan* v. *The Prince of Arcot's Endowments*[1]. That an unincorporated body cannot be sued is clear. In Halsbury's Laws of England (Hailsham Edition), Volume IV, page 498, paragraph 921 runs thus :

"It has already been stated that an unincorporated members' club is not a partnership nor an association which, as an association is legally recognised ; and questions frequently arise as to who are the persons liable for goods supplied to such a club, or on contracts professedly made on its behalf. These questions depend on the ordinary principles of agency. The person supplying the goods must proceed against the persons who gave or authorised the giving of the order ; he must prove that the defendants, either by themselves or by their agent, entered into the contract."

In *Walker* v. *Sur*[2], it is laid down that only those persons who signed the contracts on behalf of the association and those who adopted them can be sued and that other persons who are members of an unincorporated body cannot be proceeded against. Here the second defendant is admittedly an employee of the Travancore National and Quilon Bank, Limited, and the first defendant-company is admittedly composed of all the employees of the Travancore National and Quilon Bank, Limited and of the Subsidiary Company as well. The second defendant thus being a member of the first defendant union is liable to be sued under the authorities just referred to. This being so, the plaintiff is entitled to a decree against the second defendant in his capacity as a member of the first defendant-company and as the person who admittedly signed the document in question on behalf of the first defendant.

I reverse the decree of the lower Court and grant a decree for Rs. 1,050 with interest from the date of suit at six per cent. per annum against the second defendant with costs here and in the lower Court.

K.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNASWAMI AYYANGAR AND MR. JUSTICE HORWILL.

Birakayala Siva Rao .. *Appellant** (*Plaintiff*)

v.

Birakayala Ramajoga Rao and others .. *Respondents* (*Defendants*).

Civil Procedure Code (V of 1908), Order 33, rule 15—Non-compliance with—Effect—Plaint filed with insufficient court-fee—Costs paid at later stage—Deficiency in court-fee made good later—Bar of limitation on later date—Dismissal of suit.

Under Order 33, rule 15, Civil Procedure Code, it is obligatory on the plaintiff that he should first pay the costs in the pauper application incurred by the Provincial Government and by the opposite party. Where the costs were paid long after the presentation of the plaint on insufficient stamp paper but before the deficiency was made good and it appeared that the suit would be barred by limitation if it was regarded as presented on the date when the costs were paid, into Court.

Held, that the provisions of Order 33, rule 15 of the Code had not been complied with and that the suit was liable to be dismissed. It could not be said under those circumstances that the suit should be deemed to be instituted on the date when the deficiency in court-fee was made good.

Appeal against the decree of the District Court of East Godavari at Rajahmundry, dated 7th September, 1940, and passed in O. S. No. 35 of 1939.

Ch. Raghava Rao for Appellant.

B. Jagannadha Das and *T. Satyanarayana* for Respondents.

The Judgment of the Court was delivered by

Krishnaswami Ayyangar, J.—This appeal arises out of a suit instituted by the appellant to recover the suit properties on the ground that he is the reversioner

1. (1938) 2 M.L.J. 148 : I.L.R. (1938) Mad. 1094. 2. (1914) 2 K. B. 930.

*Appeal No. 304 of 1941. 7th January, 1943.

to the estate of one Siva Rao, to whom they originally belonged. Siva Rao died in 1879 and was succeeded by his adoptive mother Syamalamba who died on 8th July, 1927. The suit was instituted on 26th June, 1939. There were six defendants in the suit and they raised various defences which are all reflected in the issues framed by the District Judge. Out of these, the first part of issue 4 and the whole of issue 7 were taken up for consideration as preliminary issues. The learned District Judge found these issues in favour of the defendants and accordingly dismissed the suit.

In order to appreciate the contentions of the appellant, it is necessary to state a few facts. On the 7th March, 1933, the appellant filed a petition under Order 33, rules 2 and 3 of the Code of Civil Procedure for leave to institute a suit for the same reliefs as those for which the present suit has been instituted. This petition was ultimately dismissed on 3rd November, 1933, the petitioner being directed to pay Rs. 17 as costs to the contesting respondents who are defendants 1 and 2 here and Re. 1 for the costs of the Government. These costs were not paid until some time after the institution of the present suit in which the plaint was filed on 26th June, 1939. The plaint bore a court-fee of annas twelve only although the proper court-fee was Rs. 337-7-9. The conduct of the plaintiff in paying a court-fee of annas twelve only can scarcely be regarded as *bona fide*, as it is impossible to imagine that he could have honestly thought that that was the court-fee. On the 27th June, 1939, the plaint was returned by the Court with a direction that the deficit court-fee should be paid and time was granted for this purpose till 10th July, 1939. On that day the plaint was re-presented but without payment of the deficit court-fee. The plaintiff again asked for time and the Court granted time till 26th July, 1939. On that date the plaint was re-presented with a court-fee of Rs. 336-7-0 which still left a deficit of annas four which was made good only on the 29th July, 1939. On the 1st August, 1939, the suit was taken on file and the plaint was numbered as O. S. No. 35 of 1939.

The two preliminary issues to which we referred were the following : —

Issue 4 : " Whether the suit is barred by reason of non-payment of the court-fee in time ? "

This is the first part of issue and the second part was ' Is the suit in time ? ' The seventh issue was :

" Whether the suit is not maintainable under Order 33, rule 15 of the Code of Civil Procedure ?"

It may be mentioned that under the provisions of Order 33, rule 15, it is obligatory on the plaintiff that he should first pay the costs in the pauper petition incurred by the Provincial Government and by the opposite party. The language of the rule leaves no room for doubt that the right of suit recognised by the rule is made expressly subject to the condition that he should pay the said costs before the institution of the suit. These costs were, however, only paid on 24th July, 1939, long after the presentation of the plaint on insufficient stamp paper, but before the deficiency was made good on 29th July, 1939. If the date when the plaint was filed, namely, 26th June, 1939, is regarded as the date on which the suit was instituted, it is plain that the plaintiff has not satisfied the condition laid down in Order 33, rule 15. The argument advanced on behalf of the appellant is this : that the plaint in the present suit should be deemed to have been instituted not on the date on which the plaint was filed but only on the date when the deficit court-fee was made good on 29th July, 1939. This is a contention which, in our opinion, leads to an absurd result. It can scarcely be doubted that if a plaintiff institutes a suit on payment of the full court-fee but without having paid the costs payable under rule 15, the suit is liable to be dismissed. If we are to accede to the argument of the appellant, it would mean that the person who has not paid the costs of the pauper petition, but who deliberately institutes a suit with an insufficient court-fee is entitled to a privilege which is not available to a *bona fide* litigant paying the full court-fee. This is, in our opinion, not common sense ; neither do we consider it good law. We must therefore negative this contention. The best that we can do for the appellant is to take the course adopted in *Ramakrishna Nadar* v. *Ponnayya*

Thirumagal Vandaya Thevar[1], and treat the suit as having been instituted on the 24th July, 1939, when the costs of the pauper petition were paid into Court. But this course would not benefit the plaintiff because by that time the suit had been barred by limitation in view of the fact that the limited owner had died on 8th July, 1927, more than twelve years before suit. The learned Judge has apparently taken this view on the point of limitation and has dismissed this suit. Mr. Raghava Rao, the learned advocate for the appellant, urges that the issue of limitation was not before the Court at the time when the preliminary issues were discussed, because it was the second part of the fourth issue that raises it. He therefore invites us to remand the suit for disposal of the issue of limitation and the other issues arising in the case with the expression of our opinion that the suit must be deemed to have been instituted on the 24th July, 1939. This course cannot, however, benefit the plaintiff in the circumstances of this case. Mr. Raghava Rao says that the suit is in time as he is entitled to claim a deduction of time taken up in the prosecution of the pauper petition, under the provisions of section 14 of the Indian Limitation Act, and if this deduction is made, the suit would be in time. Now, in the first place it falls to be mentioned that the plaint, as it stands, does not ask for any exemption under this section or any other section. Secondly no claim to deduction of time seems to have been made in the Court below when the preliminary issues were discussed. In fact, the plaintiff cannot ask the Court to take into consideration this exemption unless the pleading contains a reference to the exemption and the ground on which it is claimed. Mr. Raghava Rao, however, invites us to give him an opportunity of pleading section 14 and for that purpose he desires us to remand the suit directing the Court below to deal with his application for amendment of the plaint so as to enable him to claim the exemption. We are not disposed to grant this prayer which is a matter entirely in the discretion of the Court. The learned Judge rightly remarks that the conduct of the appellant has not been such as to warrant the Court showing any indulgence to him. He remarks that the appellant has been guilty of dishonesty in filing the plaint on a court-fee of twelve annas and in making no mention of the pauper petition and its dismissal with costs. It is unnecessary to say whether the facts are sufficient to warrant the observation that the appellant has been dishonest. But we consider that his conduct cannot be regarded as *bona fide* when he filed the suit with a court-fee of annas twelve only. In these circumstances we do not consider that this is a fit case in which an indulgence ought to be granted to the appellant.

The position then being that the suit must be deemed to have been instituted only on the 24th July, 1939, more than twelve years after the cause of action accrued to the appellant, it must be held to be barred in the absence of any exemption. As we have pointed out, no exemption has been claimed. We therefore concur in the finding of the learned Judge that the suit is barred by limitation.

The appeal therefore fails and is dismissed with costs.

B.V.V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BYERS.

Malireddi Venkatapathi and others .. *Petitioners** (*Respondents 1 to 3*)

v.

Malireddi Veerayya and others .. *Respondents* (*16th Defendant*).

Civil Procedure Code (*V of 1908*), *Order 41, rules 20 and 22—Memorandum of cross-objections—Party not impleaded in appeal—Procedure for filing objections against—Time limit.*

When a respondent in an appeal proposes to file a memorandum of cross-objections against a person who is not a party to the appeal, two distinct operations are necessary. He must first implead the person as a party under Order 41, rule 20 of the Code and then, having done so, he must put in his memorandum of cross-objections under rule 22. In order that he may succeed under rule 20, he must bring his application within the time allowed for filing an appeal against the person sought

---

1. (1935) 69 M.L.J. 791.

*C. M. P. No. 4197 of 1942. 8th December, 1942.

to be impleaded. Having succeeded in getting him impleaded, he must file his memorandum of objections within the period of limitation contemplated by rule 22.

Ponnusami Asari v. *Palaniandi Mudali*, (1920) 11 L.W. 602; *Chockalingam Chetti* v. *Seethai Acha*, (1927) 54 M.L.J. 88 : L.R. 55 I.A. 7 : I.L.R. 6 Rang. 29 (P.C.) and *Rajendranath Chatterjee* v. *Mahes Lata Debi*, (1925) I.L.R. 53 Cal. 270 and *Venkata Narasimha Rao* v. *Krishnabayamma*, A. I. R. 1929 Mad. 479, considered.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to make Yendru Papanna, the sixteenth defendant in O. S. No. 56 of 1940 on the file of the Court of the Subordinate Judge of Cocanada, a party respondent to A. S. No. 157 of 1942 on the file of the High Court.

V. Suryanarayana for Petitioners.

G. Balaparameswara Rao for *P. Suryanarayana* and *K. V. Rangachari* for Respondents.

The Court made the following

ORDER.—The petitioners are the decree-holders in Original Suit No. 56 of 1940 on the file of the Subordinate Judge's Court, Cocanada, and against the decree an appeal has been filed in this Court by some of the defendants. The sixteenth defendant in the lower Court is not a party to the appeal but the decree-holders seek to file a memorandum of cross-objections against him under Order 41, rule 22 of the Code of Civil Procedure. The sixteenth defendant objects on two grounds, firstly, that it is not open to the respondents in the appeal, to file a memorandum of cross-objections against a person who is not a party in the appeal, and secondly, that it is not open to the Court to add him as a party to the appeal merely for this purpose.

The learned advocate for the petitioners relies on the decision in *Ponnuswami Asari* v. *Palaniandi Mudali*[1] in which it was held that the appellate Court has jurisdiction under Order 41, rule 20 of the Code of Civil Procedure to add a defendant as a party to an appeal even though the defendant may not be interested in the original appeal. The facts in that case were that defendants 3 and 4 in the suit in the trial Court had appealed against the plaintiff's decree, making him the sole respondent. The plaintiff then applied to implead the second defendant and preferred a memorandum of cross-objections against him asking for a decree against his share also, relief against the second defendant having been refused in the trial Court. By the time the plaintiff applied to bring the second defendant on record and file a memorandum of cross-objections against him, limitation for preferring an appeal had expired but nevertheless it was held that the lower appellate Court had jurisdiction and that the procedure adopted in adding the second defendant was not irregular although he was not interested in the result of the appeal.

The learned advocate for the respondents has cited the decision in *Chockalingam Chetti* v. *Seethai Acha*[2], and he contends that the decision relied on by the learned advocate for the petitioners has been overruled. In this case it was decided by the Privy Council that an appellate Court has power to add a party only if he is interested in the result of the appeal and if the period of limitation for preferring an appeal against him had expired, he could not be said to be interested in the appeal. The following observations in the judgment are of particular interest:

"The addition of a respondent whom the appellant has not made a party to the appeal is expressly dealt with in Order 41, rule 20, on which the plaintiff relied both in the Appellate Court and before their Lordships. That rule empowers the Court to make such a party a respondent when it appears to the Court that " he is interested in the result of the appeal." Giving these words their natural meaning—and they cannot be disregarded—it seems impossible to say that in this case the defendants against whom these suits have been dismissed, and as against whom the right of appeal has become barred, are interested in the result of the appeal filed by the plaintiff against the other defendants. It was for the plaintiff-appellant, who applied to the Court to exercise its powers under this rule, to show what was the nature of their interest and this he has failed to do.

Their Lordships are therefore of opinion that the Appellate Court were right in rejecting his application under this rule."

This decision clearly overrules the decision of this Court in *Ponnuswami Asari* v. *Palaniandi Mudali*[1]. It follows that the sixteenth defendant cannot, therefore, be

1. (1920) 11 L.W. 602.
2. (1927) 54 M.L.J. 88 : L.R. 55 I.A. 7 : I.L.R. 6 Rang. 29 (P.C.).

impleaded as a party under Order 41, rule 20 of the Code of Civil Procedure, since limitation has run out in his favour. However, it is contended by the petitioners' learned advocate that the filing of a memorandum of cross-objections under Order 41, rule 22 of the Code is not limited in its application to parties who are already on the record and that it is open to the decree-holder-petitioners to file a memorandum of cross-objections against the sixteenth defendant although he was not a party. This aspect of the matter has been dealt with in the case of *Rajendranath Chatterjee* v. *Mahes Lata Debi*[1], where it was held that the Civil Procedure Code does not contemplate the filing of cross-objections against a person who is not a party to the appeal. The basis of that decision was the wording of clause (3) of rule 22 of Order 41, which is in these words :

> "Unless the respondent files with the objection a written acknowledgment from the party who may be affected by such objection or his pleader of having received a copy thereof, the Appellate Court shall cause a copy to be served, as soon as may be after the filing of the objection, on such party or his pleader at the expense of the respondent."

The learned Judges considered that the use of the word 'party' indicated that the rule contemplated the filing of cross-objections only against a person who was already a party to the appeal. The same view was taken by Curgenven, J., in the case of *Venkata Narasimha Rao* v. *Krishnabayamma*[2], where he held that a party who has not filed an appeal against another party not himself an appellant cannot have him added for the purpose of filing a memorandum of cross-objections where the time for appealing has expired.

It follows that when a respondent in an appeal proposes to file a memorandum of cross-objections against a person who is a not party to that appeal, two distinct operations are necessary. He must first implead the person as a party under Order 41, rule 20 of the Code and then, having done so, he must put in his memorandum of cross-objections under rule 22. In order that he may succeed under rule 20, he must bring his application within the time allowed for filing an appeal against the person sought to be impleaded. Having succeeded in getting him impleaded, he must file his memorandum of cross-objections within the period of limitation contemplated by rule 22. In the present case the period contemplated by rule 20 having expired and the sixteenth defendant not already being a party, it is no longer open to the petitioners to file a memorandum of cross-objections against him.

In the result the petition is ordered to be dismissed with the costs of the respondent sought to be added.

B.V.V. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KING.

The Nagoor Durga, represented by its managing Trustees Sultan Kalifa Sahib and another .. *Appellants**

v.

S. Kasinatha Iyer and others .. *Respondents.*

Madras Agriculturists' Relief Act (IV of 1938), section 15—Decree against original holder for arrears of rent—Original holding ceasing to exist and new holdings recognised by landlord in its stead—Payment of rent for faslis 1346 and 1347 not possible in respect of original holding—New holders cannot claim the wiping off of the arrears of rent.

In a suit to recover arrears of rent due upon a holding under the Madras Estates Land Act, before the decree was passed part of the holding had been sold by *S*, the original ryot, to one *M* and a joint decree was given against both giving a charge over the entire properties. There was also a direction that execution should be taken first against the properties then held by *M*. When the final execution application was filed, various items of property held by *M* had been already sold in execution, only 4 items out of it still remained unsold and were in the possession of a woman *D* as alienee from *M*. The items of property held by *S* at the time of the decree had later on come to be held by a number of persons. The holding of *S had* ceased to exist as such and the plaintiff was accepting rent from the new tenants. *D's* property had been exempted from further liability by reason of her

1. (1925) I.L.R. 53 Cal. 270.
2. A.I.R. 1929 Mad. 479.

*A. A. O. No. 292 of 1941. 14th December, 1942.

taking advantage of section 15 of Madras Act IV of 1938 and the decree-holder had not contested the validity of the order.

In the circumstances, *held*, the original decree having been granted jointly against *S* and *M* the charge over the items of property cannot be split up into two halves.

The holding of *S* having ceased to exist in its original form it was impossible for any person to pay any rent for the original holding of *S* as rent due for faslis 1346 and 1347 so as to claim a wiping off of the arrears of rent for the previous faslis under Madras Act IV of 1938; accordingly the plaintiff would be entitled to recover the full amount due from the purchasers from *S*. The fact that *D* was held entitled to take advantage of section 15 of the Act will not mean that that advantage can accrue for the benefit of the alienees from *S*.

Arunachalam v. *Seetharam*, (1941) 1 M.L.J. 561 : I.L.R. (1941) Mad. 930, distinguished.

Appeal against the decree of the District Court of East Tanjore at Negapatam in A. S. Nos. 143 and 145 of 1940 preferred against the decree of the Court of the Sub-Collector of Negapatam in E. P. No. 147 of 1940 in S. S. No. 11 of 1928.

K. V. Ramachandra Aiyar for Appellants.

T. E. Ramabhadrachariar and *K. Raman* for Respondents.

The Court delivered the following

JUDGMENT.—The subject-matter of this appeal is the right to execute a decree granted in favour of the appellant in 1928. This decree was in a suit to recover arrears of rent due upon a holding under the Madras Estates Land Act. Before the decree was passed part of the holding had been sold by the original ryot, P. G. Subramania Ayyar, to A. Mahadeva Iyer and when the suit was decreed a joint decree was given against these two persons. There was of course a charge given over the property comprised in the original holding of Subramania Ayyar and as part of that holding had been alienated to Mahadeva Iyer, the items of the charged property were enumerated in two schedules, Schedule A dealing with the property then held by Mahadeva Iyer and Schedule B property held by Subramania Ayyar. There was also a direction that execution should be taken first against the property in Schedule A.

Various execution petitions were filed and various items of property in Schedule A were in fact sold. Then came the final execution application from which this appeal arises. By that time there were only items 3, 8, 9 and 11 still unsold in A Schedule and there were items 1 to 6 and 8 to 14 still available for sale in the B Schedule. The four items in the A Schedule were in the possession of a woman named Dharmi Ammal as alienee from Mahadeva Iyer. The items of the B Schedule were owned by a number of respondents.

The decision of the Sub-Collector of Negapatam was that as Dharmi Ammal was an agriculturist and as she had paid the rent due on those items of property which were her holding at that time, items 3, 8, 9 and 11 of A Schedule were exempt and that nothing further was due from those properties towards the decree debt. There was, however, a decree against the present respondents for the full amount still due under the original decree of 1928 and for the sale of their holdings for the realisation of that amount. There were then two appeals by the six respondents, three in each appeal, to the learned District Judge of East Tanjore. The learned Judge held that the original decree which was charged upon both A and B Schedules should now be split into two and that only one half of the decree amount should be regarded as charged upon the A Schedule and only one half upon the B Schedule. The appellant had not contested the decision of the Sub-Collector that Dharmi Ammal's property was now exempt and that so far as the A Schedule was concerned no further property could be brought to sale. In the result, the learned District Judge gave a decree for one half of the amount claimed against the properties in the B Schedule held by the seven respondents. He also with the consent of the advocate for the decree-holder apportioned amongst these seven defendants the amount of this half decrce which was still due according to his findings. This is now a second appeal by the appellant against six of the seven respondents, omitting the seventh respondent whose separate holding amounts to only three cents and from whom a sum of Rs. 3-0-3 was declared due by the learned District Judge.

The main point which it seems necessary to decide in this appeal is whether the provisions of the Madras Agriculturists' Relief Act (IV of 1938) in any way prevents the decree-holder from proceeding against the properties now in the hands of the six respondents for the full amount of the decree debt still due to him.

It is argued for the appellant—and against this argument there is no answer—that the original decree was granted jointly against two defendants and that there was a charge created over the items of property in both A schedule and B schedule and there seems no justification whatever for the learned District Judge holding that this charge could be split up into two halves, one falling upon the A schedule and one falling upon the B schedule. However, if section 15 of the Madras Act IV of 1938 can be held to apply to the facts in this case, it may be argued that one half of the arrears of rent for which the appellant obtained his decree has, in fact, been discharged by payments made under that section. The question then arises whether section 15 can apply to the facts of the present case. It seems to me quite clear that it cannot. It must be mentioned at this stage that the original holding held by Subramania Iyer before 1928 has long since ceased to exist. It has been split up into a number of holdings and the appellant himself has recognised these holdings and their tenants and is accepting rent from them on the basis of the new holdings. It seems to me on these facts that it is quite impossible for any person to pay any rent for the original holding of Subramania Iyer as rent due for faslis 1346 and 1347. It is only if rent is paid for these faslis and paid in time that any claim can be made under Act IV of 1938 for the wiping off of arrears of rent for the previous faslis. As I now hold that such payment is impossible it seems to me beyond all doubt that in the peculiar circumstances of this case no advantage whatever can legally or logically be taken of section 15. As a matter of fact however section 15 has been applied by the learned Sub-Collector and it is because of section 15 that he held that Dharmi Ammal's properties were no longer liable. The appellant was content with that decision, and when the appeals came before the learned District Judge he did not attempt to have it set aside. The present respondents are all held to be either non-agriculturists or agriculturists who have not proved to the satisfaction of the Court that they have paid rent in respect of their separate holdings for faslis 1346 and 1347 in time. In effect, therefore, the appellant is now proceeding against persons who in any case can take no direct advantage of section 15 of the Act. There seems therefore no reason *prima facie* why as against these respondents the appellant should not have a decree for the full amount which he now claims.

It was argued however on behalf of the respondents that the principle enunciated by this Court in *Arunachalam* v. *Seetharam*[1], will apply to the present case and that inasmuch as Dharmi Ammal has been held entitled to take advantage of section 15 of the Act then that advantage will accrue for the benefit of all the respondents *Arunachalam* v. *Seetharam*[1], was a very different type of case. It was a case of a mortgage debt which at the instance of the mortgagor had been scaled down and this Court held that when such a debt had once been scaled down any property which was security for that debt could not be sold for anything more than the scaled down mortgage money, no matter whether that property was in the possession of a non-agriculturist or not. These facts are not reproduced here. There is no scaling down here at the instance of the original holder of the holding. Subramania Iyer and Dharmi Ammal and all the respondents are precisely on the same footing. None of them can be approximated to the position of a mortgagor and none of them separately to the position of a purchaser of the equity of redemption . It seems to me that the principle in *Arunachalam* v. *Seetharam*[1], cannot therefore, be applied to the present case.

It has been argued further on behalf of the respondents that a decree for the full amount said to be due under the original decree of 1928 cannot be granted because if it is granted they have no right of contribution against the other holders such as Dharmi Ammal, and that it is because of the appellant's conduct that they

1. (1941) 1 M.L.J. 561 : I.L.R. (1941) Mad. 930.

have no such right of contribution against them. They attack the appellant's conduct in not filing a memorandum of cross-objections before the learned District Judge against the finding of the Sub-Collector that Dharmi Ammal's properties were exempt from all further liability. It seems to me that this question of the right of contribution will still be open to the respondents in case this appeal is allowed. It is argued that they cannot meet a plea of *res judicata* on the part of such defendants as Dharmi Ammal. But I am unable to see any matter which is *res judicata* in this litigation. The Sub-Collector no doubt held that Dharmi Ammal was not liable and the properties which she possessed were not liable to be sold. But, at the same time, he also held that in spite of that fact a decree could be given against these respondents for the full amounts still due. There was, therefore, no enunciation of any principle by the first court that this liability could be split between Dharmi Ammal and the other respondents, so that the other respondents would be liable only for what remained after Dharmi Ammal's liability had been considered. There seems also in this suit no direct contest of any kind between Dharmi Ammal and the present respondents. In these circumstances, I am unable to see that the question of any possible right of contribution in favour of the respondents has been decided in this litigation and I cannot therefore hold that this question presents any obstacle to the granting of a decree in favour of the appellant such as he now seeks against the respondents.

In the result, therefore, this appeal must be allowed and a decree granted to the appellant against the six respondents for double the amount awarded by the learned District Judge. I have already mentioned that the appellant's learned advocate in the District Court had no objection to the apportioning as between these respondents of the liability. That apportioning has been done in the schedule attached to the judgment. In the result, therefore, the amount found due by the learned District Judge from each of the six respondents who are respondents to this appeal will now be doubled. The appellant will be entitled to his costs throughout from the respondents. The memoranda of cross objections will be dismissed with costs.

Leave is refused. *Appeal allowed.*

K. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNASWAMI AYYANGAR AND MR. JUSTICE KUNHI RAMAN.

K. Manathunainatha Desikar .. *Appellant** (*Plaintiff*)

v.

Gopala Chettiar and others .. *Respondents* (*Defendants*).

Trust—Office of manager of temple—Line of devolution—Founder's intention—Descendants in male and female line to take—Validity—Rule in Tagore case—Applicability.

The law gives to the author of a public religious trust the privilege of prescribing, if he is so minded, a line of succession to the office of the manager of the institution without conforming to the law of inheritance. This principle has its foundation in the distinction that exists between heritable property over which the owner has only a restricted power of disposition and a mere office which confers on the holder a bare right of management without any right to a beneficial interest in the property committed to his charge. Where in prescribing a line of devolution for the office of manager of a temple the founder provided that his sons should be the life trustees after him, and that after their lifetime the office should devolve on his descendants in the male as well as in his female line,

Held, that the scheme of succession vesting the management in the descendants of the founder both in the male and the female line was not hit at by the rule in *The Tagore case*, (1872) 9 Beng.L.R. 377 (P.C.) and that it was not invalid on any ground.

Case-law reviewed.

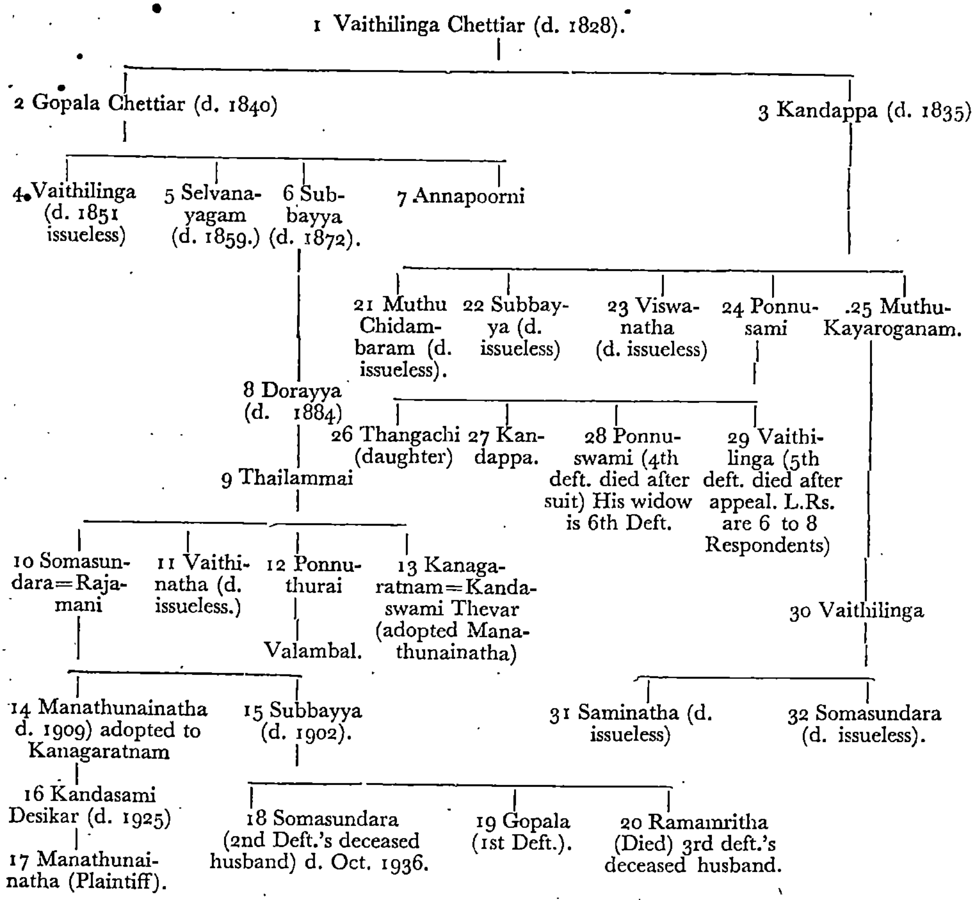
Appeal against the decree of the Court of the Subordinate Judge of Mayavaram in O. S. No. 20 of 1938 (O. S. No. 4 of 1937 on the file of the late Sub-Court of Tiruvarur).

T. V. Muthukrishna Aiyar and *R. Sundaralingam* for Appellant.

A. V. Viswanatha Sastri for Respondents.

---

*Appeal No. 387 of 1940. 9th December, 1942.



The Judgment of the Court was delivered by

Krishnaswami Ayyangar, J.—This appeal arises out of a suit instituted by the appellant Manathunainatha Desikar for an injunction against the respondents restraining them from interfering with his possession of the suit properties jointly along with the respondents. He also prayed that he might be put in joint possession of the suit properties if that course was found necessary. The properties in respect of which these reliefs were asked admittedly belong to a Siva temple situate in Jaffna in Ceylon founded by Vaithilinga, an ancestor of the parties in or about the year 1790. It would seem that this temple dedicated to Sri Viswalinga Vaitheeswaraswami owns extensive properties in Jaffna besides the properties in suit which are situate in the village of Meppalam in Mannargudi Taluk, Tanjore District. Before the year 1900 these lands were the property of one Thangathachi who held apparently a widow's estate. But in that year there was an agreement entered into between her on the one hand and Subbayya, the then trustee of the temple, on the other, by which it was arranged that the Meppalam lands should be made over to the temple in exchange for the temple lands in another village known as Raghunathapuram. This agreement is Ex. XIV dated 22nd April, 1900 and was immediately given effect to, though a formal deed of exchange (Ex. G.) was only executed on 16th October, 1909. It may be mentioned that the lands in Raghunathapuram were gifted to the temple either by Gopala Chetti, a son of the founder Vaithilinga Chetti or by him and his wife some time before 1840. The deeds of gift are not available, but nothing turns upon their absence so far as the present case is concerned inasmuch as it is conceded the temple has an indisputable title to the Meppalam lands now in suit.

The appellant claimed to be entitled to joint possession of the lands in suit as a trustee of the temple along with defendants 1, 4 and 5. All of them are descendants of the original founder Vaithilinga ; but while these defendants are in the direct male lineage, the plaintiff-appellant is the grandson of Manathunainatha who though born in the family of Vaithilinga had been adopted away into a different family. The adoptive mother however was a daughter born in the family. The genealogical table annexed to this judgment shows the members of this family and their descent from the common ancestor Vaithilinga, who it was that originally founded the temple and endowed it with most of its properties. The appellant is No. 17 in this table and his grandfather Manathunainatha, No. 14 was adopted to Kandaswami Thevar, the husband of Kanakaratnam, No. 13. The appellant is accordingly the great grandson of Kanakaratnam who was a daughter of one of the founder's grandsons, namely, Subbayya.

Two main questions, and only two, appear to have been raised and considered in the trial Court. The first of them is whether the appellant is entitled to claim the office of trusteeship under the scheme laid down by the founder in Ex. A dated 20th April, 1805. This instrument appears to be the last will and testament of (1) Vaithilinga, the father. The document is in old colloquial Tamil. Some of the words used are not literary and are in common use only among the illiterate. The syntax also is difficult to follow. In spite of these defects it is not difficult to ascertain the intention of the testator. In the opening words of the document the testator directs that the temple and its properties and the charities connected therewith should be managed and supervised by his sons (2) Gopala Chettiar and (3) Kandappa Chettiar, (and) the descendants in the female line from generation to generation so long as (any member of) the family should exist. There is no mention here of the descendants in the male line. But in the closing words, the testator makes his meaning plain by stating that his sons, his descendants in the male line and his descendants in the female line should manage the charities actively and diligently so as not to allow the spiritual benefit earned (for the family) to depart from them. According to the respondents, the effect of the document is this : that the testator gave a life trusteeship to his own sons, Gopala and Kandappa, and after them he directed the office to devolve upon his descendants in the male as well as in the female line. In so far as the will gave the trusteeship to the two sons during their lives, the provision is said to be valid, but the course of devolution of the trusteeship thereafter among his descendants as laid down in the will is attacked as bad in law under the principle of the well known decision of the Judicial Committee in *Jatindra Mohan Tagore* v. *Gnanendra Mohan Tagore*[1], The argument is that the will purports to create a line of succession opposed to the ordinary rules of Hindu Law and involves a gift of the office of trusteeship to unborn persons. Before discussing this question which was pressed with considerable force and learning it is necessary to clear the ground by disposing of certain other contentions based upon the views expressed by the trial Judge.

The learned Subordinate Judge is of opinion that females are wholly excluded whether born in the family or brought into it by marriage. With this conclusion we find ourselves in agreement. But the learned Judge goes further and says that it was the intention of the testator that the succession to the office should follow the line of succession to the property of the family, but subject to the qualification that the nearer in degree excludes the more remote. He has accordingly disallowed the plaintiff's claim to the trusteeship both on the ground that his grandfather having been adopted away from the family did not get any part of the property of the founder's family and the plaintiff therefore inherited none ; and also on the ground that he is lower in descent than the contesting defendants 1 and 5. We are unable to find any basis in the will to support the learned Judge's conclusion. The testator has said nothing from which it can be said that he intended those alone among his descendants to take the trusteeship, who inherited the family property. Nor is there any support to be found in Ex. A for the proposition that the testator intended the

1 (1872) 9 Beng.L.R. 377 (P.C.)

nearer amongst his descendants to exclude the more remote. On the contrary, the expressed intention is that the divine grace earned for the family should be retained in the family and shared by his descendants both in the male and the female lines and for that reason it would seem that he gave the management to all of them. In other words, the responsibility of the management was to be shared in order that the spiritual benefit may also be shared. It follows that nothing could have been farther to the testator's mind than the idea of excluding any of his descendants from participating either in the trusteeship or in the benefit to result therefrom.

But the more important question which arises for consideration is that which relates to the applicability of the principles of the *Tagore case*[1] to the scheme of management laid down by Vaithilinga, by which the office of trusteeship was conferred on his descendants both in the male and the female lines. Regarded as a scheme of succession regulating the descent of *property*, it involves no doubt the recognition of equal and simultaneous rights in both classes of heirs, and to that extent it is opposed to Hindu Law. But is the office of the manager or Dharmakarta of a public temple, property in the legal sense of the word? Restrictions against transfers of property in perpetuity and restrictions on the liberty of the individual to direct its devolution in a manner inconsistent with the ordinary rules of law, have their real origin in public policy. The principle is explained by the Judicial Committee in *Tagore* v. *Tagore*[1], thus,

"Inheritance does not depend upon the will of the individual owner; transfer does. Inheritance is a rule laid down (or, in the case of custom, recognised) by the State, not merely for the benefit of individuals, but for reasons of public policy. (Domat 2413).

It follows directly from this that a private individual, who attempts by gift or will to make property inheritable otherwise than the law directs, is assuming to legislate, and that the gift must fail, and the inheritance takes place as the law directs. This was well expressed by Lord Justice Turner in *Soorajomonee Dassee* v *Denubundo Mullick*[2], 'A man cannot create a new form of estate or alter the line of succession allowed by law for the purpose of carrying out his own wishes or views of policy.'"

The second principle of Hindu Law also recognised by the Board in this case is that a gift to persons yet unborn is absolutely void. The statutory modifications of this rule are not material in the present case and do not call for notice. It would follow as a result of the *Tagore case* that if the office of trustee or manager of a temple can in law be regarded as *property*, the scheme of the testator, whether taken as laying down a rule of devolution or conveying the office of trusteeship to descendants yet unborn, must be held to be bad. But if a bare right to manage the temple and its affairs does not partake of the character of *property*, it is difficult to conceive how the *Tagore case* can come in the way of a person who is attempting to regulate not the descent of his property but the choice of the individuals who are to hold the office of manager of a temple founded by him. Where such is the purpose, no objection on grounds of public policy can possibly arise. In fact, schemes are framed every day by the Courts laying down rules for the filling up in future of the office of trustee or trustees which are totally inconsistent with the law, as declared in the *Tagore case*. So far as we are aware, nobody has ever suggested that such schemes are invalid or open to attack for reasons of public policy. It cannot be pretended that in the matter of framing schemes the Courts are supreme and possess the power of transgressing the law of inheritance or the law of gifts. It is to be remembered in this connection that such institutions are admittedly favoured at any rate to this extent, namely, that the rules against perpetuities and accumulations which apply to gifts and bequests in favour of private individuals, are relaxed in their case.

Before we proceed to consider this question it is desirable to point out that from early times observations occur in the reported cases which seem to recognise in the author of a religious or charitable trust absolute freedom to lay down his own rules of succession and management unhampered by the general law. In *Shah Ghulam Rahimatullah Sahib* v. *Mohamed Akbar Sahib*[3], which related to the office of Sujjadah of a mosque, the Chief Justice Sir W. Morgan, in delivering the judgment of the Court is reported to have observed,

"It was hardly disputed that, in cases of this kind, the determination of the question of the

1. (1872) 9 Beng. L.R. 377 (P.C.).
2. (1857) 6 M.I.A. 526 at 555.
3. (1875) 8 M.H.C.R. 63.

succession depends not on the general law of property but upon the rules which the founder of the endowment may have established, whether such rules are defined by writing or are to be inferred from evidence of usage."

In *Greedharee Doss* v. *Nundokissore Doss Mohunt*[1], the Judicial Committee approved of the following proposition of law laid down by Sir Barnes Peacock as Chief Justice of the High Court of Bengal,

"We apprehend that if a person endows a college or religious institution, the endower has a right to lay down the rule of succession, but when no such rule has been laid down, it must be proved by evidence what is the usage, in order to carry out the intention of the original endower."

This statement was again quoted with approval by the Board in *Rajah Vurmah Valia* v. *Ravi Varmah Kunhikutti*[2], where the actual question which fell to be decided related to the validity of a transfer of the office of trusteeship. The Karnavans of four Malabar tarwads were under the constitution of the particular institution, namely, Tracharmana Pagoda, its Urallars and the question was whether they could lawfully alienate their right to manage the Pagoda. The High Court held that the alienation was invalid. The Privy Council affirmed the decision. The following observations are of particular interest in connection with the judicial character of the office of trustee. The Board observed,

"The unknown founder may be supposed to have established this species of corporation with the distinct object of securing the due performance of the worship and the due administration of the property by the instrumentality and at the discretion of four persons capable of deliberating and bound to deliberate together ; he may also have considered it essential that those four persons should be the heads of particular families resident in a particular district, open to the public opinion of that District, and having that sort of family interest in the maintenance of this religious worship which would insure its due performance."

The Privy Council would here seem to indicate that the several trustees who held the office constituted a species of corporation (*Vidyapurna* v. *Vidyanidhi*[3] on this aspect) to which had been entrusted the duty of management by the founder. It is clear in this case that the founder was deemed to have prescribed a method of devolution under which the seniormost members for the time being of four families should be the managers. If this is regarded as a rule of devolution with respect to a right in property, it certainly goes against the *Tagore case* and it is remarkable that nobody ever thought of raising the objection.

In our view the decisions referred to above lend support to the appellant's contention that the law gives to the author of a public religious trust, the privilege of prescribing, if he is so minded, a line of succession to the office of the manager, without conforming to the law of inheritance. This principle, as we have indicated, has its foundation in the distinction that exists between heritable property over which the owner has only a restricted power of disposition and a mere office which confers on the holder a bare right of management without any right to a beneficial interest in the property committed to his charge. A hereditary office being something which is capable of being inherited, necessarily involves the idea of property and must accordingly be left to be governed by the general law of inheritance. One test of property as distinguished from a mere office may be said to consist in this : that while the former is partible, the latter is not. We are conscious that the decisions of the Privy Council in *Ramanathan Chetty* v. *Murugappa Chetty*[4], might be interpreted as recognising the partibility of the office of managership of a public temple. But there the office was admittedly hereditary, and was therefore a species of heritable property to which the *Tagore case* would be applicable. Vide *Gnanasambanda Pandara Sannidhi* v. *Velu Pandaram*[5] Whatever the true facts were, the Judicial Committee have since supported the decision in *Ramanathan Chetty* v. *Murugappa Chetty*[4], on the ground that it related to a private trust. In *Sethuramaswamier* v. *Meruswamier*[6], where the lands attached to a religious office held by the head of a mutt were held impartible, the Board observed,

"With regard to what are called private charities, such as endowments for the support of the

1. (1867) 11 M.I.A. 405 at 428.
2. (1876) L.R. 4 I.A. 76 : I.L.R. 1 Mad. 235 (P.C.).
3. (1903) 14 M.L.J. 105: I.L.R. 27 Mad. 435.
4. (1906) 16 M.L.J. 265 : L.R. 33 I.A. 139 : I.L.R. 29 Mad. 283 (P.C.).
5. (1899) 10 M.L.J. 29 : L.R. 27 I.A. 69 : I.L.R. 23 Mad. 271 (P.C.).
6. (1917) 34 M.L.J. 130 : L.R. 45 I.A. 1 : I.L.R. 41 Mad. 296, 303 (P.C.)

family idol, the law, as laid down by various decisions in India, and apparently accepted in one case by the Privy Council (*Ramanathan Chetty* v *Murugappa Chetty*[1]) is that, if there is no contrary provision in the original grant, the right of management passes to the natural heirs of the original grantee, and, if there be no other arrangement or usage and no scheme settled by the Court, will be exercised by the managing member of the family before partition, or in turn by the several heirs after partition.

But their Lordships' attention has not been drawn to any case in which these decisions as to management have been applied to lands which constitute the endowment of such a charity as those in question in this suit."

It follows that where the office is not hereditary, each succeeding trustee takes the office not as the heir of his predecessor but *pro forma doni*, as a direct nominee under the rules of succession laid down or presumed to have been laid down by the founder.

The respondents' contention that Vaithilinga's scheme of succession except in so far as his sons were concerned failed on account of the *Tagore case* is sought to be supported mainly on the authority of a Full Bench decision of the Calcutta High Court in *Manohar Mukerji* v. *Bhupendranath Mukerji*[2]. Before referring to this case it is desirable to draw attention to the conflict of view which had prevailed in the same Court, with a view to the understanding of the precise point of the controversy.

In *Gopal Chunder Bose* v. *Kartick Chunder Dey*[3], a testator after making various gifts to members of his family gave and bequeathed a sum of Rs. 20,000 for religious worship to be carried in a pagoda established at his residential house and on land contiguous to it. He made the following provision for the management of the pagoda,

" The superintendence of the pagoda I entrust to my wife and after her death to hold it by my son Gour Mohan Dey, after his death by my daughter and her husband Nundo Doolai Bose, and their male children successively."

Regarded as a direction dealing with property rights the provision for management is undoubtedly opposed to the principle of the *Tagore case* and was accordingly declared invalid. The High Court observed as follows :

" It was contended before us for the respondent that we are not dealing with an actual bequest or gift of immovable property, but only with the appointment of persons to superintend and manage the pagoda. It would appear, however, from the observations of their Lordships of the Judicial Committee of the Privy Council in the recent, and as yet, unreported case of *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram*[4], delivered on the 19th December, 1899, that the ruling in the *Tagore case* is applicable to a hereditary office and endowment as well as to other immovable property."

The case was taken up to the Privy Council, and was disposed of by Lord Macnaghten in a single sentence in which the decision of the High Court was approved as having given a perfectly correct interpretation of the will, no other interpretation being possible. The decision had reference, it must be added, to a family trust, as is indeed the case with all the Calcutta decisions to be referred to later and its effect is only to emphasise the applicability of the *Tagore case* to hereditary offices. In *Ramabrahmam Chatterjee* v. *Kedar Nath Banerjee*[5], it was found that the shebaitship of a temple vested in the descendants of the founder in the male line, but his descendants in the female line had always participated in the *bhog* offerings made to the idols. The right of the latter having been denied by the former, a suit was brought to enforce the right to participate in the *bhog* offerings. Sir Ashutosh Mookerjee, J., who delivered the judgment of the Court, stated the question which arose for consideration as follows :

" whether it was competent to the founder to direct that the shebaitship shall be vested in his descendants through his sons and that his descendants through his daughters should have the right to participate in the *bhog* offering."

This question was answered in the affirmative, The following observations of the learned Judge appear to be apposite in the present connection :

" In the words of Lord Mansfield in *St. Johns College* v. *Todington*[6], a charitable corporation in so far as it is charitable, is the creature of the founder. On this view, Lord Hardwicke had ruled in *Green* v. *Rutherford*[7], that the founder may provide for the government and administration of his

1. (1906) 16 M.L.J. 265 : L.R. 33 I.A. 139: I.L.R. 29 Mad. 283 (P.C.).
2. (1932) I.L.R. 60 Cal. 452 (F.B.).
3. (1902) I.L.R. 29 Cal. 716.
4. (1899) 10 M.L.J. 29 : L.R. 27 I.A. 69 I.L.R. 23 Mad. 271 (P.C.).
5. (1922) 36 C.L.J. 478.
6. (1757) 1 Burr. 158 (200): 97 E.R. 245.
7. (1750) 1 Ves. Sen. 463 (472) : 27 E.R. 1144.

creature and the application in perpetuity of the revenue ; see also *Phillips* v. *Bury*[1], which was ultimately decided by the House of Lords: *Phillips* v. *Bury*[2], and contains an elaborate review of the rights of founders of charitable and religious trusts. This is subject to the reservation that a founder may not, unless special power has been reserved in this behalf, after the constitution of the corporation, vary the trusts or modify the application of the endowment or its revenues."

Phillips v. *Bury*[2], which is a decision of the House of Lords is phrased in the legal technicalities of the ancient English law. But the following sentences which sum up the position can be understood :

" But private and particular corporations for charity, founded and endowed by private persons, are subject to the particular government of those who erect them. Therefore, if there be no visitor appointed ; in all such cases of Eleemosynary Corporations, the Law doth appoint the Founder, and his Heirs to be Visitors ; They are patrons, and not to be guided by the common known Laws and Rules of the Kingdom ; but such corporations are as to their own Affairs to be governed by the particular Laws and Constitution assigned them by the Founder."

The idea that successive trustees of a religious or charitable trust form a kind of corporation is here expressed and it was perhaps the self-same idea which was echoed by the Privy Council in *Rajah Varmah Valia* v. *Ravi Varmah Kunhikutti*[3], to which we have already referred. In *Mathuranath Mukerjee* v. *Lakshminarain Ganguly*[4], a testator dedicated his immovable property to *Ishur Debseva*, and appointed his widow to act as shebait and gave her power to appoint a successor. The widow appointed a great nephew of the testator as shebait, but the appointee was a person not born during the lifetime of the testator. Though such an appointment would be void on the principle that the donee must be a person in existence at the death of the testator (vide *Bai Mativahoo* v. *Bai Mamoobai*[5]), the Court upheld the appointment on three grounds : (1) A trusteeship with power to appoint a successor is well known to Hindu Law, (2) that the *Tagore case* itself recognised the possibility of exception "for which authority may be found in Hindu Law or usage." and such an exception is implicit in the rule which allows the founder of a religious trust to lay down a general rule of succession to the managership, and (3) it was competent to the testator to empower a Civil Court to appoint as successors from time to time persons not born. This view found favour in *Sreepathi Chatterjee* v. *Krishnachandra Banerjee*[6], where the Court observed that the rule in the *Tagore case* prohibiting a Hindu from creating a special line of succession unknown to Hindu Law does not apply to the case of appointment of a shebait of a family Thakur, for an appointment to such an office creates no interest in the property. The learned Judge said,

" The appointment of a shebait therefore is obviously not a gift of any property to the shebait but it is purely an appointment to an office without, it may be, any remuneration whatsoever."

In *Pramathanath Mukerjee* v. *Amir Chandra Banerjee*[7], decided a few days later, a Division Bench of the Calcutta High Court consisting of Suhrawardy and Duval, JJ. took a different view but without noticing the decision in *Sreepati Chatterjee* v. *Krishnachandra Banerjee*[6], In this case it appeared that a testator made a gift of certain properties to his family idol and appointed his wife and his three brothers as shebaits of the endowment. As to future shebaitship he made the following provision :

" When you all have ceased to be, he who shall be of the Hindu persuasion and senior in age amongst your legal heirs, shall have the management conferred upon him."

The will also contained a declaration that the testator's brother's possession of the shebaitship and property was subject to the rights of the members of the family of the original shebaits to reside in a certain house, to repair it, if necessary to get their maintenance out of the offerings to the idol and to enjoy certain other rights. There were no emoluments or interest in the property as such attached to the office of shebait. The learned Judges held that the provision in the will giving the shebaitship to the senior in age among the legal heirs of the testator failed as to those who were not alive at the death of the testator. The decision was rested on the authority of the

---

1. (1690) 1 Shower 360.
2. (1694) Shower P.C. 35 : 1 E.R. 24.
3. (1876) L.R. 4 I.A. 76 : I.L.R. 1 Mad. 235 (P.C.).
4. (1922) I.L.R. 50 Cal. 426.
5. (1897) 24 I.A. 93.
6. (1924) 41 C.L.J. 22.
7. (1923) 40 C.L.J. 564.

Privy Council in *Gopal Chunder Bose* v. *Kartick Chunder Dey*[1] and also upon the decision of the Calcutta High Court in *Kunjamani Dassee* v. *Nikunja Behari Das*[2]. These cases proceed on the principle of law enunciated in the case of *Tagore* v. *Tagore*[3], extended to a hereditary office by *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram*[4]. The Court declined to draw any distinction between a bare trusteeship and a trusteeship carrying emoluments and refused to accept the argument that the *Tagore case*[3] in so far as it negatived the validity of a gift to an unborn person is not applicable to a case where a bare right of management and no property is involved.

In view of the conflict of decisions the question was referred to a Full Bench of three Judges in *Manohar Mukerji* v. *Bhupendranath Mukerji*[5]. The case-law was considered at great length by the Court and it was laid down that the *Tagore case*[3] applied to the office of a shebait. The headnote of the case runs as follows :

> " The founder of a Hindu *debutter* is competent to lay down rules to govern the succession to the office of shebait subject to the restriction that he cannot create any estate unknown or repugnant to Hindu law.
>
> A person succeeding to the shebaiti is a grantee or donee of property and his right to succeed to the office is subject to the rules that a gift cannot be made by a Hindu to a person not in existence at the time of the gift.
>
> Rules for succession to the office of shebait are rendered invalid by reason that they provide for the office to be held by some among the heirs of a founder to the exclusion of others in a succession differing from the line of Hindu inheritance."

The correctness of the Full Bench decision was later affirmed by the Privy Council in *Ganeshchunder Dhur* v. *Lal Behary Dhur*[6], where a Hindu testator after directing the payment of certain legacies, had given by his will the residue of his estate to his executors and trustees upon trust to pay the balance of the income of the estate to the shebaits for the time being of the Thakurs established by him and located in his family dwelling house. He then laid down the following rule for the succession to the office of shebaitship :

> " I appoint my sons Kartick Chunder Dhur and Ram Chunder Dhur to be the shebaits of the said Thacoors and I direct that upon the death, retirement or refusal to act of any of them or any of the future shebaits the then next eldest male lineal descendant of Kartick Chunder Dhur or Ram Chunder Dhur shall act as shebait in place of the deceased or retiring shebait or shebaits refusing to act as such—it being my intention that the eldest for the time being in the male line of my said sons Kartick Chunder Dhur and Ram Chunder Dhur shall always remain as joint shebaits and in the event of the death or refusal to act of any shebait the then next male member of the branch to which the shebait dying or refusing belonged shall act as a shebait in his place or stead."

It was agreed before the Board that there was a valid gift for life to the testator's sons Kartick and Ram ; but the rest of the clause was attacked as invalid as laying down a line of succession not permissible under Hindu law. The Privy Council, Lord Thankerton, observed as follows :

> "Their Lordships apprehend that the law applicable to the present case is well settled, and that the question is one of construction of the will. The well-known *Tagore case*[3] laid down two separate principles : (*a*) that a person capable of taking under a will must be such a person as could take a gift *inter vivos*, and therefore must either in fact or in contemplation of law be in existence at the death of the testator, and (*b*) that all estates of inheritance created by gift or will, so far as they are inconsistent with the general law of inheritance are void as such, and that by Hindu law no person can succeed thereunder as heir to the estates described in the terms which in English law would designate estates tail. As Lalbehary and Netye two of the grandsons who had been born before the testator died were in being at the testator's death, the first of these principles presents no difficulty. In *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram*[4], it was held by this Board that the second ruling in the *Tagore case*[3] above referred to is applicable to an hereditary office and endowment as well as to other immovable property. This decision was followed in *Manohar Mukerji* v. *Bhupendranath Mukerji*[5]."

It was accordingly held that the provision of the will relating to the holding of the office of shebaitship after the respective deaths of Kartick and Ram failed constituting, as it did, an invalid line of succession which was not permissible under the Hindu law. The rule applied here to the office of shebait is the same as is applicable to immovable property. In *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram*[4], the Privy Council was called upon to consider whether with respect to the hereditary

1. (1902) I.L.R. 29 Cal. 716 (P.C.).
2. (1915) 20 C.W.N. 314.
3. (1872) 9 Beng.L.R. 377 (P.C.).
4. (1899) 10 M.L.J. 29 : L.R. 27 I.A. 69 : I.L.R. 23 Mad. 271 (P.C.).
5. (1932) I.L.R. 60 Cal. 452 (F.B.).
6. (1936) 71 M.L.J. 740 : L.R. 63 I. A. 448 (P.C.).

office of the trusteeship of a public religious endowment each successive trustee takes a life estate directly under the grant made or presumed to have been made by the founder when he established such a hereditary office, or whether the succeeding trustee steps in as the heir of his predecessor in office. It was held that the Hindu law did not permit the creation of successive life estates in the endowment on the principle of the rule in the *Tagore case*[1] and they observed:

" In their Lordships' opinion the ruling in *Jattindra Mohan Tagore* v. *Gnanendramohan Tagore*[1], is applicable to an hereditary office and endowment as well as to the other immovable property."

It follows that an hereditary office and immovable property were regarded by the Judicial Committee as standing on the same footing so as to prevent the founder in the one case and the owner in the other from prescribing a rule of succession contrary to Hindu law, for instance, by the creation of successive life estates. The endowment in this case was undoubtedly of the nature of a public religious trust attached to the temple at Tirukkadayur. The trustee for the time being was given no beneficial interest at all in the endowment and his duty was to manage it and apply the income for the benefit of the temple without any remuneration for himself.

It must therefore be taken as settled that the shebaiti office equally with the hereditary office of manager of a South Indian temple is a species of property to which the restrictions enunciated in the *Tagore case*[1] are applicable. But we consider that the position of a shebait with reference to the maintenance and management of family trusts such as those in vogue in North India is essentially different from that of a dharmakarta or manager of a public temple in this part of the country. Unlike the shebait, the manager has no beneficial interest whatsoever in the endowments and is merely the holder of an honorary office. There are no emoluments attached to the office and he has no rights and no privileges with reference to the distribution of the income as he is under a duty to adhere strictly to the established *mamool* obtaining in the particular institution. In some temples he receives honours in the shape of garlands, but this is a mere mark of respect commonly shown to others also. The Full Bench (*Manohar Mukerji* v. *Bhupendranath Mukerji*[2]) of the Calcutta High Court in coming to the conclusion that shebaitship is *property* and not a mere office, laid emphasis on the fact that the manager or custodian of the idol of the institution is in almost every case given the right to a part of the usufruct, the mode of enjoyment and the amount of usufruct depending on usage and custom, and has a very large discretion in the distribution of *prasad* and matters of that character. The learned Judges observe at page 494 :

" Shebaitship in its true legal conception, involves two ideas, the ministrant of the deity and its manager ; it is not a bare office but an office together with certain rights attached to it. A shebait's position towards the *debattar* property is not similar to that in England of a trustee towards the trust property ; it is only that certain duties have to be performed by him which are analogous to those of trustees . . . . . The shebait deals with the property in his custody or management as if he has some property, though not the full rights of property, in it, the legal property vesting in the idol."

A careful analysis of the reasoning of the Full Bench shows that it is the possession of a right in the property of the endowment, which formed the basis of the judgment and led to the view that the shebaiti office was property. The argument before the Full Bench and in particular the following passage in the judgment sufficiently indicates that if the shebaiti office could be regarded as an office pure and simple, the rule in the *Tagore case*[1] would have been held inapplicable. The alternatives before the Court were thus expressed at page 466,

" The questions referred to the Full Bench, therefore, mainly depend on the question whether shebaitship in Hindu law is property of any kind, to which *Tagore* v. *Tagore*[1] may apply, or is merely an office to which the founder of an endowment is competent to appoint or nominate persons in any order of succession, which may have the effect, so far as the founder is concerned, to use the words of Lord Justice Turner in *Soorjemoney Dossee* v. *Deenabandu Mullick*[3] of creating a new form of estate or altering the line of succession allowed by law, for the purpose of carrying out his own wishes or views of policy."

The Full Bench of the Calcutta High Court has refused to draw a distinction between private and public trusts in deciding whether the shebaiti office is property or not.

1. (1872) 9 Beng. L.R. 377 (P.C.).
2. (1932) I.L.R. 60 Cal. 452 (F.B.).
3. (1857) 6 M.I.A. 555.

But this point does not appear to have arisen for decision, and the view expressed was merely *obiter*. It is true that the Privy Council has given its approval to the conclusion there reached, but this does not mean that their Lordships affirmed even the *obiter dictum* aforesaid. The fact is that in all the Calcutta cases to which our attention has been drawn it would seem that the shebaiti office which was in question related to a private trust in favour of a family Thakur. We are also conscious that if the office of a manager or dharmakarta is hereditary it must be deemed to be a species of property heritable and descendible according to Hindu law, and one to which the principle of the *Tagore case*[1] is applicable as ruled in *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram*[2]. But a non-hereditary office must be considered with special reference to the particular incidents attaching to it; and if those incidents do not confer on the trustees an interest in the endowment, but only lays him under a duty to manage, it is impossible to maintain in the absence of definite authority that the office is property in any sense of the term.

That the office of the shebait is essentially different in character from that of the manager or dharmakarta of a temple in South India has been laid down by the Privy Council in plain language in *Srinivasachariar* v. *Evalappa Mudaliar*[3]. Their Lordships observed that the term " dharmakarta "

> " is in truth the legal equipollent to trustee. The position of dharmakarta is not that of a shebait of a religious institution, or of the head of a mutt. These functionaries have a much higher right with larger power of disposal and administration, and they have a personal interest of a beneficial character.
>
> In the very learned judgments delivered in *Vidyapurna Tirta Swami* v. *Vidyanidhi Tirta Swami*[4], the distinction between those functionaries is explained. But a dharmakarta is literally and no more than the manager of a charity, and his rights, apart it may be in certain circumstances from the question of personal support, are never in a higher legal category than that of a mere trustee."

A correct description of the position of the dharmakarta of a temple approved by the Privy Council in the case just cited will be found in the judgments of Subramania Ayyar, O.C.J., and Bhashyam Ayyangar, J., in *Vidyapurna Tirta Swami* v. *Vidyanidhi Tirta Swami*[4]. Subramania Ayyar, O.C.J., said:

> " In the case of temples the ideal person being the idol itself, the natural custodian of the property who has no beneficial interest whatsoever in the endowments, but occupies the fiduciary position of a mere manager (*Jaggadamba Dassee* v. *Puddomoney Dassee*[5]) may not improperly be looked upon as subject strictly to the liabilities of a trustee."

Bhashyam Ayyangar, J., expressed the same idea, perhaps, in more detail, when he said:

> " In the case of temples, the endowments, whether in the shape of landed property or tasdik allowances, have to be devoted to the carrying out of the specific purposes connected with the temple, *i.e.*, the daily worship and the periodical ceremonies and festival—purposes defined and settled by usage and custom and generally recorded in what is known as the ' dittam '—and the dharmakartas are mere trustees for the carrying out, or executing of such trusts."

Further light is also thrown by the observations of the Privy Council in *Ramanathan Chetti* v. *Murugappa Chetti*[6], where their Lordships describe the office of a temple dharmakarta in the following terms:

> " The manager of the temple is by virtue of his office the administrator of the property attached to it. As regards the property the manager is in the position of a trustee. But as regards the service of the temple and the duties appertaining to it he is rather in the position of the holder of an office or dignity which may have been originally conferred on a single individual but which in course of time had become vested by descent in more than one person."

This, of course, was said with reference to a hereditary office; but whether hereditary or not, the position is that of a bare trustee. It is scarcely necessary to point out that in the case of a non-hereditary dharmakarta office a succeeding dharmakarta does not inherit to or derive his title from the predecessor. In *Mohamad* v. *Ganpati*[7], expressly approved by the Privy Council in *Vidya Varuthi Tirta* v. *Baluswami Iyer*[8], the question arose whether a suit by a succeeding dharmakarta

1. (1872) 9 Beng.L.R. 377 (P.C.).
2. (1899) 10 M.L.J. 29: L.R. 27 I.A. 69: I.L.R. 23 Mad. 271 (P.C.).
3. (1922) 43 M.L.J. 536: L.R. 49 I.A. 237: I.L.R. 45 Mad. 565 (P.C.).
4. (1904) 14 M.L.J. 105: I.L.R. 27 Mad. 435.
5. (1875) 15 Beng.L.R. 318 at 330.
6. (1906) 16 M.L.J. 265: L.R. 33 I.A. 139: I.L.R. 29 Mad. 283 (P.C.).
7. (1890) I.L.R. 13 Mad. 277.
8. (1921) 41 M.L.J. 346: L.R. 48 I.A. 302: I.L.R. 44 Mad. 831 (P.C.).

for recovery of possession of land leased by his predecessor in office was barred by limitation. In that connection the Court observed :

"In the present case, though the plaintiff may in point of time have succeeded the dharmakarta who made the alienation, he does not derive his title from that dharmakarta and is therefore not bound by his acts. Subject to the law of limitation, the successive holders of an office, enjoying for life the property attached to it, are at liberty to question dispositions made by their predecessors. (*Papayya* v. *Ramanna*[1], *Jamal Sahib* v. *Murugayyaswami*[2], *Motho Koorey* v. *Tekait Ram Chunder Singh*[3]) and it is equally clear that time runs against the successor who challenges his predecessor's disposition, not from the date of the disposition, but from the date of the predecessor's death, when only the successor became entitled to possession."

This principle, it may be remarked, has been given effect to by the later decisions of the Privy Council and has now been incorporated in the Limitation Act by the addition of Article 134-B.

It seems to us that Vaithilinga's scheme of succession vesting the management in his descendants both in the male and the female line has not been shown to be illegal or invalid. We are naturally averse to the creation of a new restraint or the extension of the old one, and we feel that that is precisely what we shall be doing if we bring offices pure and simple involving no rights of property whatever, within the rule in the *Tagore case*[4]. We are not called upon to say whether the management prescribed by Vaithilinga is wise, or will make for the efficient administration of the temple and its endowments. There may be a good deal to be said against it from this aspect of the matter, but the question before us is quite different. Management by a miscellaneous group without the necessary cohesion is almost certain to lead to confusion and neglect, and may result in the frustration of the objects of the founder. The remedy for the evil not perhaps foreseen by the author, is to approach the Courts for the framing of a scheme for placing the temple administration under proper management. But till then the existing scheme with all its defects and all its anomalies has to be recognised, the result being that the appellant is, and is entitled to be one of the lawful managers of the suit properties along with the representatives of Vaithilinga in the male line.

The appellant has sought to rest his case on an alternative ground also, namely, that he has acquired a hereditary right of co-trusteeship along with the contesting defendants by adverse possession. This question is not specifically raised in the plaint, nor is it covered by any definite issue. Apart from this objection, the evidence is not such as to warrant a finding of a prescriptive title in the appellant. It is true that from about the year 1886 the appellant's predecessors-in-title are shown to have taken part in some of the transactions relating to the temple at Jaffna and the lands here. In view of the close relationship of the parties and the other circumstances proved in the case we do not think that we will be justified in differing from the finding of the learned Subordinate Judge that the appellant has failed to make out a title by adverse possession. On the respondents' side it was contended that even on the assumption that the appellant had a right to the trusteeship it had been lost by adverse possession. We consider that the conclusion reached by the learned Subordinate Judge on this part of the case is correct. As observed by him, there is no definite proof of ouster or exclusion which is an essential element of adverse possession as between co-owners. The result is that the materials placed before the Court are not such as to induce us to differ from these conclusions of the Court below.

In the result, there will be a decree in favour of the plaintiff for the joint possession of the office of trusteeship and of the trust properties described in the suit and the defendants shall be restrained by a permanent injunction from interfering with the plaintiff's enjoyment of the office of joint trusteeship along with the respondents. The appellant is entitled to his costs here and in the Court below from the respondents.

B.V.V. ——— *Appeal allowed.*

---

1. (1884) I.L.R. 7 Mad. 85.
2. (1886) I.L.R. 10 Bom. 34.
3. (1882) I.L.R. 9 Cal. 411.
4. (1872) 9 Beng.L.R. 377 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KING.

C. R. Parankusa Naidu .. *Petitioner**

v.

Ayyanna Naidu and another .. *Respondents.*

Limitation Act (IX of 1908), Article 182 (5)—Execution petition returned endorsed "Vakil has no power Returned. Time 7 days"—Subsequent order rejecting application for non-compliance—If "final order."

An application for execution was made on 21st June, 1937. It was endorsed by the Court : "Vakil has no power. Returned. Time 7 days." In fact the application was not taken away from the Court but allowed to remain in the office and subsequently in December an order was passed rejecting it. There was no direct question of intermediate negligence and subsequent action on the part of the petitioner.

In the circumstances, *held*, that the order is a "final order" as contemplated by Article 182 of the Limitation Act and a subsequent application within three years of such order is within time.

Official Receiver of Ramnad v. *Narayanaswami Thevar*, (1941) 2 M.L.J. 1018 and *Syed Ghulam Khader Sahib* v. *Viswanatha Iyer*, (1942) 2 M.L.J. 768 at 772, distinguished.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the District Court of Trichinopoly dated 10th March, 1942, and made in A. S. No. 103 of 1941 preferred against the order of the Court of the District Munsiff of Kulitalai dated 27th January, 1941, and made in E. P. No. 450 of 1940 in S. C. S. No. 4821 of 1929, Small Cause Court, Trichinopoly.

K. G. Srinivasa Aiyar for Petitioner.

T. M. Venugopala Mudaliar for Respondents.

The Court delivered the following

JUDGMENT.—This petition raises the vexed point as to what constitutes the "final order" on an execution application presented in accordance with law. The order, which is the subject-matter of the petition, was passed on the 23rd of December, 1937, upon an application filed on the 21st June, 1937. If that order is a final order, this appeal must succeed as the present application would then be in time. It has been held by both Courts below that the order is not final. The full facts are that the application was made on the 21st June, 1937, in the Court of Small Causes at Trichinopoly and was endorsed by the Court saying, "Vakil has no power. Returned. Time seven days." In fact the application was not taken away from the Court, but allowed to remain in the office and subsequently in December an order was passed rejecting it. Now it is clear to my mind that the order rejecting an application of this kind, because the applicant will not comply with certain requisitions is a final order. It is an order which in the words of *Syed Ghulam Khader Sahib* v. *Viswanatha Iyer*[1], "puts an end to the application in respect of which it is made so far as the Court passing it is concerned." It is however argued for the respondent that this is not a final order, because the non-compliance of the applicant with the requisition of the Court, together with the failure to ask for any excusing of delay necessarily means that the application must be considered never to have had any existence. It is true that there have been recent decisions of this Court—one in *Official Receiver of Ramnad* v. *Narayanaswami Thevar*[2] and the other which has just been quoted in *Syed Ghulam Khader Sahib* v. *Viswanatha Iyer*[1] — which make it clear that an application which has been returned to a party and held back by that party for three years or so without taking any action whatever to carry out the instructions of the Court, is an application which must be deemed never to have existed. But I am not prepared to extend the principle which has been applied to facts of that kind to the facts in the present case. It seems to me there are two important points of distinction—one is that in the present case there is no direct question of intermediate negligence and subsequent action on the part of the petitioner. This is a case in which the Court finds that the petitioner leaves his application within the Court precincts, and the Court determines to put an end to it. It is not a case in which an artificial order is obtained

*C. R. P. No. 1334 of 1942. 19th February, 1943.

1. (1942) 2 M.L.J. 768 at 772.

2. (1941) 2 M.L.J. 1018.

from the Court by the re-presentation of an application after an inordinately long interval. Secondly, the order of rejection in this case is passed within six months. There is none of that sense of artificiality about it which is produced by an order of rejection passed without any intermediate action or orders of any kind after an interval of three years or so. It seems to me that this is a clear case of an application being presented, and being dismissed within a reasonable time by the Court itself, on the Court's own initiative, because the party will not comply with the Court's order.

It is conceded that the application need never have been ordered to be returned to the party at all; that it was in every respect in accordance with law and that it was filed in the proper Court. It seems to me in these circumstances that the order of the 23rd December, 1937, is the final order contemplated by Article 182 of the Limitation Act and that the application, which is the subject-matter of this revision petition was within time.

The revision petition is accordingly allowed and the application of the petitioner restored to file and directed to be disposed of according to law. The respondents must pay the petitioner's costs of this revision petition. Costs of the lower appellate Court will abide the event.

K.S. — *Revision allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BYERS.

Bajee Sahib .. *Petitioner* (Accused-Surety).*

Criminal Procedure Code (V of 1898), section 514—Accused joining the army and going beyond jurisdiction—Liability of surety—Surety entitled to have opportunity for showing cause why penalty should not be paid but not to an adjournment for that purpose.

Where the accused was absent not because he had absconded and gone into hiding but because he had joined the army, the surety who had executed a bond for his appearance can be made liable. In the absence of compulsory military service, joining the army is an entirely voluntary act and there is no distinction between joining the army and going beyond the jurisdiction of the Court and merely absconding in the ordinary way.

Re *Vijayaraghavalu Naidu*, (1912) 26 M.L.J. 63 : I.L.R. 37 Mad. 156, distinguished.

It is sufficient that the surety is given an opportunity of showing cause why the penalty should not be paid and section 514 of the Criminal Procedure Code does not entitle him to an adjournment for that purpose.

Petition under sections 435 and 439 of the Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Chief Presidency Magistrate of the Court of the Presidency Magistrates, Egmore, Madras, dated 15th September, 1942 and made in M. P. No. 755 of 1942.

K. W. Rama Rao for Petitioner.

The Court made the following

ORDER.—So far as the procedure before the learned Magistrate is concerned, I am unable to see any room for interference. The petitioner had already been given time to produce the missing accused. This he did not do and was then called upon at the next hearing for his explanation. His explanation was that the missing accused had joined the army and disappeared without his knowledge. Admittedly he was not given an adjournment for the purpose of showing cause why the penalty should not be paid but section 514 of the Criminal Procedure Code does not entitle him to an adjournment for the purpose. It is sufficient that he was given an opportunity of showing cause.

Regarding the merits, the petitioner's learned advocate relies on the decision in the case of Re *Vijayaraghavalu Naidu*[1], but that was the case of an accused person who committed suicide while he was on bail and the learned Judges held in that case that the fact that the sureties did not take steps to prevent the accused from committing suicide even if the possibility of his doing so may have passed through

---

*Cr. R. C. No. 616 of 1942. 30th September, 1942.
(Cr. R. P. No. 584 of 1942).

1. (1912) 26 M.L.J. 63 : I.L.R. 37 Mad. 156.

their minds did not amount to such neglect or default as to make them liable on the bond. In the present case the accused was absent not because he had absconded and gone into hiding but because he had joined the army. In the absence of any compulsory military service, I am unable to see any distinction between joining the army and going away beyond the jurisdiction of the Court and merely absconding in the ordinary way. Joining the army was an entirely voluntary act and I am unable to see how the petitioner cannot be made liable for the accused's absence on this score when he would certainly be liable on his bond if the accused had merely defaulted in the more usual way. I am unable to see any sufficient reason for interference in revision. The petition is dismissed.

K.S. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CHANDRASEKHARA AYYAR.

K. V. Muhammad .. *Appellant** (*Defendant*)

v.

Chakkappayyan Kannan .. *Respondent* (*Plaintiff*).

Torts—False imprisonment—Suit for damages—Police officer effecting arrest—When protected—Absence of bona fide *reason—Liability in damages—Previous prosecution for same act—Acquittal—Whether bars civil suit—Madras District Police Act (III of 1888), section 53—Scope and effect.*

In considering the question of the lawfulness of an arrest or imprisonment there is a distinction between the powers of a police officer and that of a private citizen and there may be cases where the former may without a warrant arrest on reasonable suspicion, " reasonable " being understood to mean a *bona fide* belief that an offence had been committed or is about to be committed, necessitating the arrest of the person concerned.

Where in a suit for damages for false imprisonment the defendant, who was a police officer, pleaded that he arrested the plaintiff because he had reason to believe that he was likely to take out a procession with music past a mosque, but the lower Courts held that the reason alleged was not true, and there appeared to be nothing else in the situation to warrant for any honest belief on the part of the defendant that the arrest of the accused was necessary,

Held, that under the circumstances the arrest could not be said to be *bona fide* and that the defendant was rightly held liable in damages for false imprisonment.

Held, further, that the fact that the accused was previously prosecuted for the same act and acquitted was no bar to the civil action for damages.

Before the bar enunciated in the proviso to section 53 of the Madras District Police Act can be held to apply the act for which the prosecution had been launched must be found to be an act contemplated by the statute itself. Even in section 53, the act complained of and referred to in its opening sentences is an act done " under the provisions of this Act." There is no warrant whatever for holding that the word " act " in the proviso is used in a more comprehensive sense than the word " act " in the body of the section itself.

Appeal against the decree of the District Court of North Malabar in A. S. No. 308 of 1937, presented against the decree of the Court of the District Munsiff of Cannanore in O. S. No. 251 of 1936.

B. Pocker for Appellant.

Respondent not represented.

The Court delivered the following

JUDGMENT.—The defendant who is the appellant is a Circle Inspector of Police. The lower Courts found that he arrested the plaintiff illegally and unlawfully without any justifying cause. For this false imprisonment, damages were awarded against him in a sum of Rs. 50. The appellant admits the arrest on 2nd February, 1936, but says that it took place at about 3 P.M. while the plaintiff's version is that he was arrested at about 12 noon. The plaintiff's evidence has been accepted by both the Courts below as regards the time of the arrest which becomes important in view of one of the defences raised by the appellant.

Plaintiff's case was that he was arrested not because of anything that he said or did justifying arrest but because of some private grudge. On the other hand, the defendant alleged that he arrested the plaintiff because it was apprehended

*S. A. No. 327 of 1939. 19th August, 1941.

that he would take out a procession with music past a mosque, as he did two days earlier. The lower Courts found that the cause given by the defendant for the arrest was not true and that the defendant had really no information in his possession before the arrest that the plaintiff was likely to be a party to any such procession justifying his being taken into arrest to prevent a probable breach of the peace.

The plaintiff has not appeared in this Court. But the facts necessary for a proper understanding of the case have been fully placed before me by Mr. Pocker, the learned counsel for the appellant. He raised two points on behalf of his client. Firstly, that as the appellant was prosecuted for the same act and acquitted by the Joint Magistrate, there is a bar to the civil action by reason of section 53 of the Madras Police Act, and secondly, that there was nothing to show that he had no credible information of the likelihood of a breach of the peace contemplated by the plaintiff in the matter of the procession with music before the mosque. If he had such information, as is probable that he possessed, in view of the report (Ex. V), the arrest was made *bona fide* and was therefore valid.

Section 53 of the Madras District Police Act does not help the appellant. Before the bar enunciated in the proviso can be held to apply, the act for which the prosecution had been launched must be found to be an act contemplated by the statute itself. Even in section 53, the act complained of and referred to in its opening sentences is an act done " under the provisions of this Act." There is no warrant whatever for holding that the word "act" in the proviso is used in a more comprehensive sense than the word " act " in the body of the section itself.

A realisation of this difficulty made the appellant to urge a feeble contention before the lower Court that he apprehended the plaintiff as a disorderly and suspicious character under the powers vested in him under section 21 of the Act. Apart from the fact that he gave no such reason in justification of his act at any earlier period, it is also true that there was nothing to show that the plaintiff was a disorderly or suspicious character within the meaning of this section. Merely because he was a member of the procession on the 31st August, 1936, it could not be concluded that he was a disorderly or suspicious character. For such description of a man, much more would be necessary in the shape of prior conduct and history, etc. Moreover, the arrest was about noon and Ex. V came into existence at about 3 or 3-30 P.M. As pointed out by the lower Court, it is not likely that the security proceedings initiated under Ex. V some hours after the arrest led the defendant to arrest the plaintiff earlier. He could have arrested him only after the security proceedings were started and, ordinarily, after a warrant was issued and not before.

Defendant was himself not sure of the ground for the arrest of the plaintiff. In one place he says that he arrested him because of the offence committed by the man on 31st January, 1936. In another place he asserted that it was because he was a disorderly and suspicious character. The third reason given by him is that it was done in view of the security proceedings launched against him, his case being that it was after the proceedings were launched that he arrested the plaintiff at 3 or 3-30 P.M., which, however, has been found to be untrue.

I agree that in considering the question of the lawfulness of an arrest or imprisonment, distinctions have been, and will have to be, drawn between the powers of a police officer and that of a private citizen and that there may be cases where the former may without a warrant arrest on reasonable suspicion, " reasonable " being understood to mean a *bona fide* belief that an offence had been committed or is about to be committed, necessitating the arrest of the person concerned. Even as regards the powers of a police officer, there is divergence of authority as would be seen from *Trebeck* v. *Croudace*[1] and *Isaacs* v. *Keech*[2] on the one hand and *Ledwith* v. *Roberts*[3] on the other. In the last mentioned case, *Ledwith* v. *Roberts*[3] which arose under the Vagrancy Act, it was pointed out that the powers of a constable to arrest without

1. (1918) 1 K.B. 158.
2. (1925) 2 K.B. 354.
3. (1937) 1 K.B. 232.

warrant was confined to persons frequenting or loitering who came within the description of suspected persons or reputed thieves and that such persons can be apprehended without warrant if they already were at the time of the arrest by reason of their previous conduct suspected persons or reputed thieves. It was not enough for the constable to allege that he had reasonable grounds to suspect that such person was loitering for the purpose of committing a crime. In the present case, *bona fides* on the part of the appellant was negatived by both the Courts.

Mr. Pocker said that the question of *bona fides* must be considered not in a very abstract way and in the detached atmosphere of a Court room, but with reference to the situation in which the appellant found himself at the time. Apart from the grounds that the defendant himself has given for the arrest, there is nothing else in the situation which prevailed at the time from which we can hold that there was warrant for any honest belief on the part of the appellant that the plaintiff was a man who had to be arrested or that the plaintiff's arrest was necessary for any particular purpose or reason.

I hold that the lower Courts have reached a correct conclusion and dismiss the second appeal. But there will be no order as to costs as the respondent does not appear.

Leave to appeal is refused.

B.V.V. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNASWAMI AYYANGAR AND MR. JUSTICE KUNHI RAMAN.

The Official Receiver of Ramnad at Madura .. *Appellant** (*Petitioner*)

v.

A.L.VR.P.V.VR. Veerappa Chettiar and others .. *Respondents* (*Respondents*).

Civil Procedure Code (V of 1908), Order 21, rule 90—Insolvency—Interim receiver appointed—Before date of appointment execution sale of debtor's property—Application by the receiver to set aside sale—Whether he had the right in the circumstances—Whether he was a person whose interests were affected by sale—Meaning of sale —Whether it had reference to confirmation of sale.

An interim receiver appointed in an insolvency adjudication of the third and fourth respondents was appointed on a date later than the date on which the sale in execution of the suit property now sought to be set aside was held and the property purchased by the first respondent. On an application by the interim receiver to set aside the sale under Order 21, rule 90 of the Civil Procedure Code on the ground of material irregularity and fraud in the conduct of the sale,

Held, (1) that a consideration of the language of rule 90 of Order 21 would show that the interim receiver did not come within the classes of persons upon whom the right to apply under the rule is conferred. The Code of Civil Procedure is a self-contained Code and in the absence of language indicating that the expression " person entitled to share in a rateable distribution " is meant to include creditors proving in insolvency, it cannot be held that the interim receiver as representing the creditors has a right to apply.

(2) That the interim receiver was not a person "whose interests were affected by the sale." It will be doing violence to the principle underlying the section to hold that the Legislature gave the right to apply under rule 90 to every creditor; if only there was the possibility of his not getting the full amount of his decree out of the assets of the creditor.

Subramania Aiyar v. *Dharmapuram Janopakara Nidhi, Ltd.*, (1928) M. W. N. 216 and *Govindaswami Chetty*, In re, (1939) 1 M.L.J. 608, explained and distinguished.

(3) The word ' sale ' in Order 21, rule 90 has no reference to the date of confirmation of the sale and therefore the interim receiver's appointment before the actual confirmation had nothing to do with the question whether he can apply as a person whose interests are affected by the sale.

Raja Raghunandan Prasad Singh v. *Commissioner of Income-tax, Bihar and Orissa*, (1933) 64 M. L. J. 544 : L.R. 60 I.A. 133 : I.L.R. 12 Pat. 305 (P.C.) and *Nataraja Pillai* v. *Rangaswami Karamandar*, (1941) 2 M.L.J. 682, referred to.

Semble.—Doubt as to whether the individual rights of creditors as a class could be said to have vested in the interim receiver.

Appeal against the order of the Court of the Subordinate Judge of Devakottah, dated 9th October, 1939, in E. A. No. 11 of 1939 in E. P. No. 115 of 1938 in O. S. No. 9 of 1931.

*A. A. O. No. 230 of 1940. 28th September, 1942.

T. M. Krishnaswami Aiyar and *M. Murugappa Chettiar* for Appellant.

V. V. Srinivasa Aiyangar, T. L. Venkatarama Aiyar and *P. S. Sarangapani Aiyangar* for Respondents.

The Judgment (16th July, 1942) of the Court was delivered by

Krishnaswami Ayyangar, J.—This is an appeal from the order of the Subordinate Judge of Devakottah dismissing an application filed by the appellant for setting aside a sale of property in execution of the decree in O. S. No. 9 of 1931 on the file of the same Court. The appellant was appointed interim receiver by the Court of the Subordinate Judge of Devakottah in I. P. No. 14 of 1937 which was a petition filed to adjudicate the judgment-debtors who are respondents 3 and 4 in this appeal. The order appointing the appellant as interim receiver was passed on 16th December, 1938, the insolvency petition having been filed on 10th April, 1937 and admitted on 30th July, 1937. The sale of the property now sought to be impugned was held on 21st November, 1938, at which the first respondent was declared the successful purchaser.

The application to set aside the sale was made under Order 21, rule 90 of the Code of Civil Procedure on the ground of material irregularity and fraud in the publishing and conducting of the sale. The Subordinate Judge dismissed the application on the ground that the appellant had no *locus standi* to present it and also held on the merits that no case had been made out for setting aside the sale. In the appeal before us we considered it desirable to hear the parties in the first instance on the question as to whether the appellant had a right to apply to the Court under Order 21, rule 90 of the Code of Civil Procedure.

A consideration of the language of the rule shows that the right to apply under it is conferred on (1) the decree-holder, (2) any person entitled to share in the rateable distribution of the assets and (3) any person whose interests are affected by the sale. On behalf of the appellant it has been vehemently argued that the appellant comes within the class of persons indicated in Nos. 2 and 3. It is urged that the appellant who is the interim receiver appointed in the insolvency petition represents all the creditors of the judgment-debtors and, if the judgment-debtors are adjudicated insolvents, the creditors would be entitled to share rateably in the distribution of the assets in insolvency. In other words, the rule according to the appellant contemplates not only persons who are entitled to come in for rateable distribution under section 73 of the Code of Civil Procedure but also persons who are entitled to dividends in the administration in insolvency. For this proposition no authority has been cited. The Code of Civil Procedure is a self-contained Code and in the absence of language indicating that the expression "person entitled to share in a rateable distribution" is meant to include creditors proving in insolvency, we find ourselves unable to accept the contention. We are firmly of the opinion that the class of persons here intended are those to whom the right to share in the rateable distribution of the assets realised in execution is given by section 73. The appellant's argument is not that the interim receiver is himself a person entitled to share in the rateable distribution of the assets but that he represents the creditors who are entitled to that right. But, as we hold that the provisions of the Insolvency Act with reference to the distribution of an insolvent's assets are not to be deemed to have been in the mind of the Legislature which enacted rule 90, this argument makes no difference.

Next it is argued that the appellant is a person 'whose interests are affected by the sale.' These words have been the subject of judicial interpretation by a number of decisions in this as well as in other Courts. The interpretation accepted by this Court is contained in the Full Bench decision in *Ayyappa* v. *Kasiperumal*[1]. Although the actual decision was that a plaintiff who had obtained an attachment before judgment of the property subsequently sold is a person whose interests are affected by the sale within the meaning of Order 21, rule 90, the Court considered the language of the section and held that the words must be taken to include not only

1. (1939) 1 M.L.J. 163: I.L.R. (1939) Mad. 374 (F.B.).

persons having a proprietary or possessory title in the property sold but also any person whose pecuniary interests are directly and immediately affected by the sale. Mr. T. M. Krishnaswami Ayyar, the learned advocate for the appellant, urges that the appellant's pecuniary interests have been affected within the meaning of the Full Bench decision. According to him, the receiver is the representative of all the creditors of the judgment-debtors and consequently all the creditors, whether they had attached the property sold or not, are entitled to apply under the rule more especially if the assets of the judgment-debtor are insufficient to satisfy the claims of all his creditors.

It has to be observed at the outset that the interim receiver came on the scene only on 16th December, 1938 when he was appointed, while the sale sought to be set aside took place much earlier, namely, on 21st November, 1938. It is difficult to understand on what principle his rights are to be antedated and made to take effect retrospectively so as to prejudice the rights of others which had come into existence long before his appointment itself. It may be that if a person has the right to apply under the rule and that right devolves by death or otherwise upon his legal representative, the latter is entitled to make this application in the exercise of a right which belonged to the party originally affected. But then the question is whether the creditors of a person even when he has not assets enough to pay all his debts can be regarded as persons whose pecuniary interests are affected by the sale of the debtor's property in execution at the instance of a decree-holder. We consider that it would be an unwarrantable extension of the meaning of the expression used in the rule if we are to accept the argument. Let us see what is the class of persons who are given the right to apply under this rule. There can be little doubt that the decree-holder is a person directly and immediately affected by the sale of the property, if it had been sold for anything less than its true value. The next class of persons referred to in Order 21, rule 90 are those who are entitled to rateable distribution that is persons who come within the language of section 73 of the Code. If we turn to section 73 what do we find? The right to share in the rateable distribution of the assets of a debtor is conferred upon a person who is not a mere creditor but upon a creditor who has sued for the recovery of his debt, obtained a decree and made his application for the execution of the decree, and even then the further condition is added that his application should have been made before the receipt of the assets by the Court in execution. In the face of the qualifications here insisted it is impossible to accept the argument that every creditor whether or not he has taken the steps indicated here, is a person entitled to apply to the Court under Order 21, rule 90. If this extended meaning is to be given to the expression under consideration, it would result in attributing to the Legislature a contradictory intention. If a creditor is not qualified to obtain rateable distribution until he has done all that section 73 requires him to do, it is difficult to agree that the Legislature intended that any and every creditor, even without taking the steps which he is bound to take for the purpose of qualifying himself for rateable distribution, is still to have the right to apply under the rule. It is urged that the tendency of this Court has been to construe the rule in a liberal spirit. But we consider that it will be doing violence to the principle underlying the section to hold that the Legislature gave the right to apply under rule 90 to every creditor if only there was the possibility of his not getting the full amount of his decree out of the assets of the debtor.

Our attention has been called to two other decisions both of single Judges, of this Court as having a bearing on the point. The earlier one is reported in *Subramania Iyer* v. *Dharmapuram Janopakara Nidhi, Ltd.*[1], where Phillips, J., held that an interim receiver appointed under section 20 of the Provincial Insolvency Act can apply under Order 21, rule 90, of the Code of Civil Procedure, for setting aside a Court-sale as a person whose interests are affected by it. It does not clearly appear, so far as we have been able to see, whether the order of appointment was made before or after the sale. But we find language employed in the judgment which

1. (1928) M.W.N. 216.

would seem to indicate that the appointment had been made before and not after. For instance, we find the following statement:

"If, therefore, property passes away from the judgment-debtor to another person there is a distinct loss to the estate *entrusted* to the receiver. The receiver has the duty of maintaining the property as it was when it *came* into his hands and it cannot be said that his interests are unaffected when such duties cannot properly be fulfilled."

The facts in the case before us are different because the interim officer was appointed 25 days after the sale. The second decision is a judgment of Stodart, J., reported in *Govindaswami Chetty*, In re[1]. The question in this case was whether a decree-holder who had attached property after the execution sale sought to be set aside but pending its confirmation, was entitled to apply under Order 21, rule 90. The learned Judge held that the mere fact of his attachment if it had been made after the sale but before confirmation did not confer upon him the right to apply as when he attached the property he knew that his attachment would disappear if the sale was in the ordinary course confirmed and would enure for his benefit only if the sale for some reason was set aside. In other words, he is a person whose interests were affected not by the sale but by the success or failure of his application. The learned Judge also held that a mere creditor has not got the right to apply under Order 21, rule 90, to set aside the sale. This and another decision of the Calcutta High Court in *Kiran Bala Shaha* v. *Sunit Prabha Shaha*[2] are also authority for the proposition that the person applying must possess an interest which can be said to have been affected at the date of the sale and not by reason of any subsequent event or act. With these judgments we entirely agree, and this is sufficient to dispose of the question. But we may notice one or two other contentions which were advanced before us.

Although the receiver was appointed long after the sale, it was contended that the word "sale" in Order 21, rule 90 had reference not to the auction sale held in the first instance but to the confirmation of the sale by the Court to be made on a later date. In the present case the sale was confirmed only after the order of the lower Court. In the meantime the interim receiver had been appointed. It is therefore argued that the appellant had become entitled to apply under the rule as his interests have been affected by the confirmation of the sale. In support of the argument that the word 'sale' means, and was intended to mean, confirmation of the sale, two decisions were brought to our notice. The first is the decision of the Privy Council in *Raja Raghunandan Prasad Singh* v. *Commissioner of Income-tax, Bihar and Orissa*[3], where their Lordships of the Judicial Committee were called upon to decide when an assessee to income-tax received profits of the property which he had bought at an execution sale and it was held that by the execution sale the purchaser does not obtain an indefeasible right, for under Order 21, rules 89, 90 and 91 the sale may be set aside on various grounds and it is only where no application is made under these rules or where such application is made and disallowed that the Court makes an order confirming the sale under Order 21, rule 92, whereupon the sale becomes absolute. In this view the Privy Council ruled that the profits must be deemed to have been received not on the date of the sale but on the date of the confirmation. We regret we are unable to see how this ruling is applicable to a case such as the present in which the question is not when profits were received but when the sale took place which is a matter to be decided entirely upon the rules contained in Order 21 of the Code of Civil Procedure. The other case is a decision of Wadsworth and Patanjali Sastri, JJ., reported in *Nataraja Pillai* v. *Rangaswami Karamandar*[4]. There the question arose under the Madras Agriculturists' Relief Act IV of 1938 and the Court had to consider whether a decree became satisfied immediately on the sale in execution of the property of the judgment-debtor or only on confirmation. The Court held relying upon the above Privy Council decision as well as certain other decisions, that the date on which the proceeds of the sale are received by the decree-holder is the date of the confirmation and not

1. (1939) 1 M.L.J. 608.
2. I.L.R. (1939) 1 Cal. 273.
3. (1933) 64 M.L.J. 544 : L.R. 60 I.A. 133 : I.L.R. 12 Pat. 305 (P.C.).
4. (1941) 2 M.L.J. 682.

the date of the sale. In our opinion this decision is equally inapplicable to the present case.

It has been argued on behalf of the respondents that even if the creditors of the judgment-debtors have a right to apply under the rule, still an interim receiver who is in the same position as any other receiver appointed by the Court is not a representative of the creditors of the judgment-debtor so as to enable him to make the application. In *Hanmant* v. *Jainapur*[1], Beaumont, C.J. and Wassocdew, J., have expressed the opinion that receivers appointed by Court are cfficers of the Court and are not the legal representatives or assignees of all or any of the parties to the suit. It may be that the receiver is appointed for the benefit of all concerned but the true position of the receiver appears to be that he is an officer of the Court, his possession being the possession of the Court through the hands of the receiver and the property in his hands being in *custodia legis*. In a sense he may be regarded as the representative of all the parties interested in the litigation in which he is appointed. But we doubt whether the individual rights of creditors as a class can be said to have vested in him. It is, however, not necessary to express a final opinion on this aspect of the question in view of our decision on the first point.

We are of opinion that the learned Judge in the Court below was right in his conclusion that the appellant was not entitled to file the application. That being so, it is unnecessary to go into the merits of the case.

The appeal fails and is dismissed with costs, one set.

This appeal having been set down for being mentioned this day, the Court delivered the following

JUDGMENT.—We are not satisfied that this is a case on which we can or would reconsider our decision. The decree will issue.

K.C. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

Muthukaruppa Ethandar and others .. *Appellants** (*Respondents-Plaintiffs*)

v.

Appavoo Nadar and others .. *Respondents* (*Appellants-Respts.-Defts.*).

Civil Procedure Code (V of 1908), Order 1, rule 8—Suit by residents of one village against those of another—Claim for payment of debt due by residents of latter village—Representative suit—Maintainability—Permission not granted before publication in Gazette—One of several defendants dropping out—Surviving parties consenting to decree—Binding nature.

The present defendants had as representatives of one village sued four ryots as the representatives of another village to recover a certain amount which they claimed was due to them in respect of the construction of a road connecting the two villages to the main road. With the plaint were filed two applications, one for an order permitting them to sue on behalf of the villagers and the other for an order allowing them to sue the then defendants as representatives of the other village. Having numbered the plaint, the Munsiff directed that notice should issue to those defendants and that a general notification should be published in the District Gazette. Subsequently the then plaintiffs along with three out of the four defendants filed into Court a statement agreeing that a decree for a certain amount should be passed against the communal properties in the village of the then defendants. One of the latter who did not join in the compromise applied for his name being removed from the suit and consented to the suit being proceeded with against the other defendants as representatives of their village. The Court passed a decree as consented to by the parties. But when the decree was sought to be executed certain persons belonging to the village of the defendants in the previous suit objected and filed a suit under Order 21, rule 63, Civil Procedure Code, contending that the decree in the earlier suit was not binding on them.

Held, that although in the earlier suit, the Court did not record the permission to sue the defendants in a representative capacity before the publication in the District Gazette, there was sufficient compliance with the provisions of Order 1, rule 8 as the villagers of the defendants' village having notice of the institution of the suit allowed it to proceed with the defendants chosen by the plaintiffs, and as they were in no way prejudiced by such a course.

Kumaravelu Chettiar v. *Ramaswami Ayyar*, (1933) 65 M.L.J. 87 : L.R. 60 I.A. 278 : I.L.R. 56 Mad. 657 (P.C.), considered.

---

1. (1938) 40 Bom. L.R. 932.

*L. P. A. No. 43 of 1941. 24th August, 1942.

Held, also that the fact that one of the defendants dropped out did not render the decree invalid as the parties had agreed that the representative suit should be proceeded with the other parties on record. And it was open to the defendants to compromise the suit brought against them in a representative capacity.

Venkatakrishna Reddi v. *Srinivasachariar,* (1930) 61 M.L.J. 135 : I.L.R. 54 Mad. 527, *Subbayya Naicker* v. *Sankarappa Naicker,* (1933) 66 M.L.J. 175 and *Krishnamachariar* v. *Chinnammal,* (1913) 24 M.L.J. 192, referred to.

Held, further, that a representative suit to enforce payment of the debt due by the whole village of the defendants was sustainable in law.

Appeal under clause 15 of the Letters Patent against the judgment and decree of Somayya, J., passed in S. A. No. 1005 of 1938 against the decree of the Court of the Subordinate Judge of Trichinopoly in A. S. No. 39 of 1937 preferred against the decree of the Court of the District Munsiff of Trichinopoly in O. S. No. 9 of 1933.

T. V. Muthukrishna Aiyar and *A. V. Narayanaswami Aiyar* for Appellants.

K. Rajah Aiyar and *A. Dorairaj* for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—The case for the appellants is completely devoid of merit, but questions of law have been raised and it is necessary to consider them.

The appellants and the fourth respondent are the managers of the communal lands of the village of Natarajapuram (also known by the name of Ethandarpatti) in the Trichinopoly Taluq. They sued in the Court of the District Munsiff of Trichinopoly for a declaration that the decree obtained in O. S. No. 82 of 1929 was not binding upon them or upon the other ryots of this village. In that suit defendants 1 to 4, as the representatives of the village of Arasankudi, sued four ryots of the village of Natarajapuram, as the representatives of that village, to recover a sum of Rs. 1,667-4-0 which they claimed was due to the villagers of Arasankudi by the villagers of Natarajapuram in respect of the construction of a road connecting the two villages with the main road. Both the villages had asked the Taluk Board authorities to construct the road and promised that they would contribute one-third of the cost, if the Taluk Board would bear the rest. It was afterwards arranged that the two villages should contribute a total sum of Rs. 4,000, which was to be borne by them equally. At a later stage it was agreed between the villagers of Arasankudi and the villagers of Natarajapuram that the Arasankudi villagers should pay Rs. 2,250 of the Rs. 4,000 and the villagers of Natarajapuram Rs. 1,750. The villagers of Arasankudi paid the full amount and the villagers of Natarajapuram reimbursed them to the extent of Rs. 500, but they failed to pay the balance, and in consequence defendants 1 to 4, suing on behalf of all the villagers of Arasankudi, instituted the suit to recover the balance.

The District Munsiff took the plaint on his file on the 20th February, 1929, and numbered the suit as No. 82 of 1929. With the plaint were filed two applications, one for an order permitting the plaintiffs to sue on behalf of the villagers of Arasankudi and the other for an order allowing them to sue the defendants as the representatives of the village of Natarajapuram. Having numbered the plaint, the District Munsiff directed that notice should issue to the defendants and that a general notification should be published in the District Gazette. The defendants were served, and the notification was duly published. After this had been done, namely, on the 19th April, 1929, the District Munsiff granted leave to the plaintiffs, as representing Arasankudi, to sue the defendants as representing Natarajapuram. In his order he pointed out that there was no opposition to the application. He also directed that as the third defendant was absent the case should proceed against him *ex parte.* Subsequently the third defendant filed an application for an order setting aside the *ex parte* order which was passed against him on the 19th April, 1929, and asked for permission to file a written statement. This application was granted. All the defendants filed written statements.

On the 2nd April, 1931, the plaintiffs and the first, second and fourth defendants filed in Court a statement agreeing that a decree for Rs. 1,250 and costs should be passed against the communal properties of the village of Natarajapuram with full liberty to the plaintiffs to proceed in execution against these properties. The third

defendant did not join in this application. In conjunction with the plaintiffs, he filed a memorandum stating that he was not willing to continue on the record as one of the representatives of the village of Natarajapuram and that the plaintiffs consented to the suit being proceeded with against the first, second and fourth defendants as the representatives of Natarajapuram. In these circumstances he asked that his name be removed from the suit. On the 7th April, ihe District Munsiff passed a decree in accordance with the terms agreed upon by the parties and set out in these two statements.

The suit out of which this appeal arises was filed by the appellants on the 4th January, 1933, in accordance with the provisions of Order 21, rule 63 of the Civil Procedure Code. The decree-holders in O. S. No. 82 of 1929 had attached the communal lands of Natarajapuram in execution of their decree and the appellants' objection to the attachment had been overruled. The District Munsiff decreed the suit on the following grounds, (1) in the earlier suit the requirements of Order 1, rule 8 had not been complied with and (2) as the third defendant had disappeared from that suit, the Court had no power to pass a decree against the three remaining defendants as the representatives of Natarajapuram without an order expressly directing the suit to proceed against them. On appeal the decree of the District Munsiff was confirmed. The defendants then appealed to this Court. Somayya, J., held that the decree which had been passed in the former suit was binding upon the plaintiffs and consequently dismissed their suit with costs. This appeal is from the judgment of the learned Judge under clause 15 of the Letters Patent.

As before Somayya, J., the appellants have raised four contentions. The first two are the contentions which the District Munsiff and the Subordinate Judge accepted. They also say that the Court has no power to pass an order allowing persons to be sued in a representative capacity when the claim is upon a mere debt. Further they say that the decree in the former suit is not binding upon them because the defendants had no power to enter into a compromise.

Order 1, rule 8 reads as follows :

"(1) Where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the Court, sue or be sued, or may defend, in such suit, on behalf of or for the benefit of all persons so interested. But the Court shall in such case give, at the plaintiff's expense, notice of the institution of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the Court in each case may direct.

(2) Any person on whose behalf or for whose benefit a suit is instituted or defended under sub-rule (1) may apply to the Court to be made a party to such suit."

Mr. Muthukrishna Aiyar on behalf of the appellants says that when the plaint is first filed it is incumbent upon the Court to pass an order permitting the suit to be brought in a representative capacity or the defendants to be sued as representatives, if the allegations in the plaint justify the order. After permission has been given, it is incumbent upon the Court to issue public notice that the suit has been instituted so that other persons may apply to be added as defendants. Here the permission to the plaintiffs in the former suit to sue as the representatives of the Arasankudi village the defendants named therein as the representatives of Natarajapuram village was granted after the publication in the District Gazette of the notice that the suit had been filed. Consequently Mr. Muthukrishna Aiyar argues that as the rule contemplates permission before publication of the notice it was necessary for the District Munsiff to issue a fresh notice and his failure to do so vitiated the proceedings. In this connection he has pointed to the following passage in the judgment of the Privy Council in *Kumaravelu Chettiar* v. *Ramaswami Ayyar*[1].

"On such permission being given it becomes the imperative duty of the Court to direct notice to be given to the absent parties in such of the ways prescribed as the Court in each case may require; while liberty is reserved to any represented person to apply to be made a party to the suit."

Emphasis is laid on the words "imperative duty." Divorced from its context this passage does give support to the appellants, but when the judgment is read as a whole, it is quite clear that the Judicial Committee did not intend to lay

1. (1933) 65 M.L.J. 87 : L.R. 60 I.A. 278: I.L.R. 56 Mad. 657 at 666 (P.C.).

down a rule that non-compliance with the strict wording of the rule was fatal to the case.

In *Kumaravelu Chettiar* v. *Ramaswami Ayyar*[1], the question was whether the decision in a former suit operated as *res judicata* when no permission had been sought or granted under Order 1, rule 8. The Privy Council held that in a representative suit the decision in a former suit does not operate as *res judicata* by reason of section 11, Civil Procedure Code, explanation VI, unless the former suit was instituted in compliance with Order 1, rule 8 of the present Code. By compliance was meant the institution of the suit with the permission of the Court after the notice as prescribed by Order 1, rule 8 had been given. But Lord Blanesburgh in delivering the judgment of the Board said that their Lordships would not exclude the possibility of a decree being within the benefit of explanation VI of section 11, where the litigation having been *bona fide* the omission to comply with the conditions of the rule had been inadvertent and no injury from the omission had been sustained by the plaintiff in the second suit. It was, however, imperative to have it recognised that the burden upon a defendant seeking a ruling to that effect was heavy indeed. No encouragement should they thought be offered to litigants if they would obtain the full benefit of Order 1, rule 8 to be careless in securing full compliance with the conditions of the rule, both in the letter and in the spirit.

The object of Order 1, rule 8 is to permit a person who has an interest in the subject-matter of the suit to apply to the Court to be made a defendant. He may not be convinced that the defendants named in the plaint will defend the suit properly as the representatives of all persons concerned. In this case the District Munsiff, strictly speaking, should have passed orders on the two applications filed by the plaintiffs in the former suit when he admitted their plaint and left the publication of the notice of the suit to a later stage, but the fact that he gave to the plaintiffs as the representatives of Arasankudi permission to sue the defendants as the representatives of Natarajapuram after he had notified by public advertisement the institution of the suit prejudiced no one. Any person residing in Natarajapuram could have applied to be made a defendant, but no one chose to do so. The villagers of Natarajapuram had notice of the institution of the suit and they were prepared to allow it to proceed with the defendants chosen by the plaintiffs. Consequently we hold that there was sufficient compliance with Order 1, rule 8.

We consider that there is no greater force in the appellants' contention that the Court was not entitled to pass a decree against the first, second and fourth defendants, because it had allowed the third defendant to drop out. Here Mr. Muthukrishna Aiyar has relied on the judgment of Ramesam J., in *Venkatakrishna Reddi* v. *Srinivasachariar*[2] and *Subbayya Naicker* v. *Sankarappa Naicker*[3]. In the former of these two cases, Ramesam, J, held that where sanction is given by a Court to certain persons *eo nomine* to institute or defend a suit and one of them dies, the right does not survive and therefore his heirs cannot come on the record unless the order granting the sanction can be construed as conferring the right to do so. He considered that the proper procedure was for the remaining persons to apply to the Court for directions and it was for the Court to decide whether it would permit them to continue to prosecute or defend the suit or whether it would insist upon the original number, in which case it should give directions in this respect. The judgment in *Subbayya Naicker* v. *Sankarappa Naicker*[3] was to the same effect. Somayya, J., considered these two decisions and in his opinion it was not incumbent upon the remaining parties to apply to the Court for directions. The suit could lawfully proceed without them. It is not necessary for the purpose of this appeal to decide whether the Court's directions are necessary or not, because it is quite clear that all parties, including the third defendant, were willing that there should be a decree against the first, second and fourth defendants in their representative capacity. In passing the decree which it did the Court in fact permitted the suit to proceed against the remaining defendants.

1. (1933) 65 M.L.J. 87 : L.R. 60 I.A. 278: I.L.R. 56 Mad. 657 (P.C.).
2. (1930) 61 M.L.J. 135: I.L.R. 54 Mad. 527.
3. (1933) 66 M.L.J. 175.

Somayya, J., considered that the appellants ought not to be allowed to raise the plea that there cannot be a representative suit in respect of a debt and we agree with him. Permission had been given to the plaintiffs in the former suit to sue in a representative capacity and it may be added that the plea was not raised in the plaint. It may also be pointed out that the suit was a claim to enforce payment of a debt due by the whole village in connection with the construction of a road for the benefit of all the villagers and it is difficult in such circumstances to see why the defendants could not be sued in a representative capacity. Otherwise it would mean the joining of every inhabitant of the village.

The last contention, namely, that the defendants in the former suit had no power to compromise can be disposed of in a few words. There are two Bench decisions of this Court which say that persons conducting a suit on behalf of themselves and others with leave of the Court can enter into a compromise so as to bind those whom they represent and the same principle must apply when the defendants are sued in a representative capacity. The first case is *Krishnamachariar* v. *Chinnammal*[1] and the second is the unreported case of *Mahalingam Chettiar* v. *Anthony Nadar*[2].

The appeal will be dismissed with costs.

B.V.V. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Tripasuru Venkata Narasinga Rao .. *Appellant** (*Plaintiff*)

v.

Vysyaraju Surayya Raju and others .. *Respondents* (*Defendants*).

Madras Estates Land Act (I of 1908)—If continues in force in the areas transferred to the province of Orissa from Madras Presidency—Holder of such estate paying peshkush of more than Rs. 500—If disqualified under proviso D to section 3 (ii) *of Madras Act IV of 1938.*

The proviso D to section 3 (*ii*) of Madras Act IV of 1938 must be taken to exclude from the definition of " agriculturist " a person who pays any sum exceeding Rs. 500 as peshkush to the Provincial Government of Madras or to any other Government provided, of course, such peshkush is paid in respect of " an estate under the Madras Estates Land Act or of a share or portion thereof."

The effect of the Government of India (Constitution of Orissa) Order, 1936, section 26 and Orissa Laws Regulation, section 7, is that the Madras Estates Land Act, is to continue in force in the areas transferred to the province of Orissa notwithstanding that the Act was expressed to apply only to the Presidency of Madras which no longer includes those areas; in other words, that the Act operates *proprio vigore* in the transferred territory as before unaffected by the transfer, and not by reason of its provisions having been re-enacted by the legislature or other competent authority of Orissa.

Accordingly where a debtor admittedly pays Rs. 2,500 as peshkush to the Provincial Governments of Madras and Orissa in respect of the estates held by him in the two provinces he is disqualified under proviso D to section 3 (*ii*) of the Madras Agriculturists' Relief Act from claiming the benefits of that Act as an agriculturist, though in respect of his Madras estate he pays a sum of Rs. 255-8-0 only as peshkush to the Madras Government.

Appeal against the decree of the Court of the Subordinate Judge of Chicacole in O. S. No. 12 of 1939.

B. Sitarama Rao and *B. Jagannadha Das* for Appellant.

The Advocate-General (*Sir A. Krishnaswami Aiyar*), *C. Sambasiva Rao* and *C. Siva Rao* for Respondents.

The Judgment of the Court was delivered by

Patanjali Sastri, J.—This is an appeal from a judgment and decree passed by the Court of the Subordinate Judge of Chicacole in a suit brought by the appellant to redeem a mortgage executed by him and his sons in favour of the first respondent (hereinafter referred to as the respondent). The appellant's sons were impleaded in the suit as defendants 2 to 4 of whom the fourth defendant died soon after the suit was instituted and the surviving sons are respondents 2 and 3 to this appeal.

The mortgage was executed on the 27th March, 1929, at Berhampore in Ganjam district then part of the Madras Presidency, and it provides for the repayment of

1. (1913) 24 M.L.J. 192.
2. C. M. A. No. 266 of 1930.

*Appeal No. 209 of 1940. 10th August, 1942.

the principal sum of Rs. 26,000 with compound interest at fourteen annas per cent. per month with yearly rests. The mortgage money was charged on immovable properties situated partly in Vizagapatam district and partly in Ganjam district. The appellant's main contention in the Court below, and only contention in this appeal, was that he and his sons were agriculturists within the meaning of the term as defined in the Madras Agriculturists' Relief Act, 1938, and that therefore the mortgage debt was liable to be scaled down in accordance with the provisions thereof. The respondent contested this claim on the ground that the appellant was disqualified under proviso D to section 3 (*ii*) from claiming the benefits of the Act as an agriculturist and that even otherwise, the Act which was passed by the Provincial Legislature could not affect the suit mortgage as the loan was advanced and the bond was executed at Berhampore outside the province of Madras and part of the properties mortgaged were also situated outside the province. The learned Subordinate Judge held that the appellant was not disqualified under the proviso, but as part of the mortgaged properties were situated outside the province and the mortgage was indivisible, the Act did not affect the respondent's rights under the mortgage and that the debt could not therefore be scaled down under its provisions. He passed a decree accordingly declaring that the respondent was entitled to the full amount due under the mortgage deed, *viz.*, the Rs. 26,000 for principal and Rs. 53,760-7-3 for interest.

In order to appreciate the contentions of the parties it is necessary to state a few facts. Before the Government of India Act, 1935, was passed, the district of Ganjam was part of the Presidency of Madras. As provided in section 289 (1) (*b*) of that Act, the new province of Orissa was constituted by the Government of India (Constitution of Orissa) Order, 1936, and certain areas were transferred from the Presidency of Madras to the new province thus constituted. Among such areas were Berhampore and Aska taluks of the Ganjam district wherein some of the mortgaged properties, namely, the Kumari estate and the house at Berhampore are situate. The other item comprised in the mortgage, namely, the Tarlapeta estate, Tekkali taluk, is situate in the district of Vizagapatam in the Presidency of Madras. The appellant pays a sum of Rs. 255-8-0 to the Government of Madras as peshkush for the Tarlapeta estate and about Rs. 2,308 to the Government of Orissa in respect of the Kumari and other estates which he owns in that province. These facts are not in dispute.

Now the definition of an "agriculturist" so far as it is material here, runs thus:—

"Section 3. In this Act, unless there is anything repugnant in the subject or context, ...

(*ii*) 'agriculturist' means a person who—

(*a*) has a saleable interest in any agricultural or horticultural land in the province of Madras, not being land situated within a Municipality or cantonment which is assessed by the Provincial Government to land revenue (which shall be deemed to include peshkush and quit rent) or which is held free of tax under a grant made, confirmed or recognised by Government . . . . Provided that a person shall not be deemed to be an 'agriculturist' if he . . . .

(*d*) is a landholder of an estate under the Madras Estates Land Act, 1908, or of a share or portion thereof in respect of which estate, share or portion any sum exceeding Rs. 500 is paid as peshkush or any sum exceeding Rs. 100 is paid as quit rent, jodi, kattubadi, poruppu or the like, or is a jenmi under the Malabar Tenancy Act, 1929, who pays any sum exceeding Rs. 500 as land revenue to the Provincial Government."

It was suggested for the appellant that the words "to the Provincial Government" at the end of the proviso qualify not only the word 'pays' in the last sentence but also the words 'is paid' in the earlier part of the proviso, so that the payment of the peshkush in excess of the specified limit must, in order to disqualify the payer under the proviso, be to the Provincial Government, and that, therefore, the appellant who does not pay more than Rs. 255-8-0 as peshkush to the Provincial Government of Madras for the Tarlapeta estate which is the only estate he owns in this province does not come within the mischief of the proviso. This argument has found favour with the learned Subordinate Judge, but we find it impossible as a matter of grammatical construction to read the last four words as qualifying the payment of peshkush referred to in the earlier part of the proviso which must, therefore, be taken to exclude from the definition a person who pays any sum exceeding Rs. 500 as peshkush to the Provincial Government or to any other Government provided, of course, such

peshkush is paid in respect of "an estate under the Madras Estates Land Act or of a share or portion thereof." We see no force in the suggestion that the Legislature is not likely to have intended to make ownership of property outside the province a ground of disqualification, as we find that in provisos A, B and C assessment to income-tax and property tax even outside the province is expressly stated to be a ground of disqualification. The fact is that while the definition makes the ownership of certain kinds of property in this province the basis of agriculturist status, the disqualifying circumstances mentioned in the provisos would appear to have reference to the general financial position of the individual. In this view the appellant would be disqualified under the proviso as he admittedly pays over Rs. 2,500 as peshkush to the Provincial Governments of Madras and Orissa in respect of the estates held by him in the two provinces, unless it can be said that the estates for which he pays peshkush to the Orissa Government are not estates "under the Madras Estates Land Act, 1908." Accordingly, arguments on this part of the case centred round the question whether the appellant was or was not "a landholder of an estate under the Madras Estates Land Act, 1908," in respect of the estates owned by him in the province of Orissa.

It is not disputed that these estates are "estates" and that the appellant is a "landholder" as these terms are defined in the Madras Estates Land Act, 1908, which in fact applied to these estates when they formed part of the Madras Presidency. And it is also admitted that, as a matter of fact, the provisions of the Act continue to operate in the areas transferred to the province of Orissa. But it was submitted by Mr. Sitarama Rao for the appellant that this was the result of the Orissa Laws Regulation, 1936, made by the Governor-General in Council "to declare the law in force in the province of Orissa." In other words, the contention was that the Madras Estates Land Act, 1908, does not apply *proprio vigore* to "estates" in Orissa but only by virtue of the legislation of a competent authority making the provisions of the Act applicable to such estates, which cannot therefore be said to be estates under the Act. On the other hand, it was contended by the learned Advocate-General for the respondent that when the new province of Orissa was constituted, the territorial application of all enactments then in force in the transferred areas was preserved intact by the express provisions of section 26 of the Government of India (Constitution of Orissa) Order, 1936, read with section 289 (2) (*c*) of the Government of India Act, and that, therefore, the appellant's estates which now form part of the province of Orissa continue to be none the less "estates under the Madras Estates Land Act, 1908." On an examination of all the relevant provisions to which our attention was called, we are of opinion that the respondent's contention is correct, and must prevail. Section 289 of the Government of India Act, 1935, having provided for the formation of the province of Orissa by an Order in Council which may also contain provisions with respect to the laws which are to be in force in the new province or any part thereof, the Government of India (Constitution of Orissa) Order, 1936, was passed defining the areas of which the new province shall consist and providing that those areas shall cease to form part of the provinces from which they were separated (section 3). Accordingly certain parts of the Ganjam district which were included in Orissa no longer formed part of the Madras presidency and the Madras Estates Land Act which extended only to that presidency could have no operation in the areas transferred to Orissa. But section 26 of the same Order in Council overrides this consequence of section 3 by providing that—

"the provisions of this order shall not be deemed to have effected any change in the territorial application of any enactment, notwithstanding that that enactment is expressed to apply or extend to the territories for the time being under a particular administration :

Provided that nothing in this paragraph shall be construed as affecting the power to make regulations for Orissa under section 71 of the Government of India Act as applied by this order."

The effect of this provision is, as it seems to us, that the Madras Estates Land Act is to continue in force in the areas transferred to the province of Orissa notwithstanding that the Act was expressed to apply only to the Presidency of Madras which of course no longer includes such areas. In other words, the Madras Estates

Land Act, 1908, operates *proprio vigore* in the transferred territory as before unaffected by the transfer, and not by reason of its provisions having been re-enacted by the Legislature or other competent authority of the province of Orissa.

Mr. Sitarama Rao, however, drew attention to the proviso to section 26 and to section 7 of the Orissa Laws Regulation, 1936, made by the Governor-General in Council under section 71 of the Government of India Act, and argued that the effect of section 7 of that regulation was to displace the operation of section 26 of the Order in Council referred to above and to re-enact the provisions contained in the Madras Estates Land Act for the areas transferred from the Madras Presidency, so that the Madras Estates Land Act is not as such in force in those areas. We are unable to accede to this argument. Section 7 of the Regulation runs thus :

> "Subject to the provisions of paragraphs 16 and 17 of the Government of India (Constitution of Orissa) Order, 1936, all enactments other than enactments repealed by this regulation made by any authority in British India and all notifications, orders, schemes, rules, forms and bye-laws issued, made or prescribed under such enactments, which were immediately before the 1st day of April, 1936, in force in any of the areas comprised in the province of Orissa shall in their application to such areas, be construed as if references therein by whatever form of words to the authorities, territory or gazettes mentioned in column 1 of the first schedule were references to the authorities, territory, or gazettes respectively mentioned or referred to opposite thereto in column 2 of the said schedule."

And item 3 (*a*) of the first Schedule which is headed "Construction of Enactments" mentions in the first column the Presidency of Madras and opposite thereto in the second column the areas separated from the Presidency of Madras and forming part of the province of Orissa. Section 7 read with Schedule I thus provides a rule of construction according to which the term "Presidency of Madras" in section 1 of the Madras Estates Land Act should be construed as referring to the areas separated from the Presidency of Madras and forming part of the province of Orissa. The language used clearly indicates that the enactments for the construction of which the section makes certain provisions are otherwise already in operation in the transferred areas. All that the section does is to say how certain expressions used in those enactments have to be understood in their application to such areas. Far from displacing the operation of section 26 of the Government of India (Constitution of Orissa) Order, 1936, section 7 of the regulation proceeds on the basis that the former provision has preserved intact the territorial application of the enactments theretofore in force in the transferred areas and gives further effect to it by providing a rule of construction for such enactments. No doubt the application of the Madras Estates Land Act to the transferred areas might as well have been secured by the Act being repealed and its provisions being re-enacted either by the Governor-General in Council during the transitional period or by the Provincial Legislature thereafter as the operation of section 26 is made expressly subject to the legislative powers of those authorities by the proviso to that section in the one case and by section 289 (2) (*c*) of the Government of India Act, 1935, in the other ; but this method was not adopted, and section 26 which, it may be noted, is not one of the provisions in respect of the transitional period, has apparently been left in full force, with the result that enactments previously applicable to the transferred areas continue to operate unaffected by the transfer. The point is a somewhat narrow one, but on a consideration of the language used in section 26 of the Government of India (Constitution of Orissa), Order and in section 7 of the Orissa Laws Regulation, we are inclined to hold that the Madras Estates Land Act continues to operate as before in the areas transferred from the Presidency of Madras to the Orissa province and not by virtue of any fresh legislation by a competent authority of the latter administration. It follows that the appellant must be regarded as being "a landholder of an estate under the Madras Estates Land Act, 1908" within the meaning of proviso D to section 3 (*ii*) of the Madras Agriculturists' Relief Act even with reference to the estates owned by him in the province of Orissa, and as he admittedly pays more than Rs. 500 as peshkush in respect of such estates he is disqualified under the proviso from claiming the benefits of that Act as an agriculturist. In this view it has become unnecessary to consider the other contentions raised by the parties.

In the result the decree of the Court below is confirmed though on different grounds, and the appeal is dismissed with costs. A certificate is granted under section 205 of the Government of India Act that this case involves a substantial question of law as to the interpretation of an Order in Council under the Government of India Act.

K. S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNASWAMI AYYANGAR.

P. S. Rathna Bai .. *Plaintiff**

v.

Mrs. A. R. Barrass and another .. *Defendants.*

Transfer of Property Act (IV of 1882), section 55 (1) (b)—*Contract of sale—Duty of vendor to produce title deeds for inspection—Limits—Vendee if entitled to search for and obtain public copies of other documents at vendor's expense.*

On a fair reading of section 55 (1) (*b*) of the Transfer of Property Act, the seller is not bound to do anything more than produce for the buyer's inspection all such documents of title relating to the property which are in the seller's possession or power. Documents of title which may not be with the seller but in his power are for instance the documents in the possession of a mortgagee or a trustee or some other person from whom they could be produced for the inspection of the buyer. The buyer has no right to say that there may be other documents of title and in the absence of a stipulation to that effect claim the right to search for them in the office of the Collector or Registrar and obtain copies at the cost of the seller.

Where, in a contract of sale, the seller undertakes to " produce all the documents relating to the house" it cannot be said that he undertook to produce all the documents necessary for making out the complete chain of title. It is more reasonable to hold that the vendor undertook to do no more than what section 55 (1) (*b*) says that a seller must do in similar circumstances. Nor can the buyer insist on the seller taking out a probate of a will or produce other documents which were not in his possession or power at the date of the contract.

Where the buyer is not satisfied with the title on the documents which were produced and which alone the seller was bound to produce, and insists on the seller producing documents which were not in his possession or power and which he had not undertaken to produce by the terms of the contract, the seller is entitled to rescind the contract.

Srinivasaraghavan for Plaintiff.

S. Srinivasaraghavan for Defendants.

The Court delivered the following

JUDGMENT.—This is a suit instituted by the plaintiff for specific performance of a contract by which the first defendant agreed to sell to the plaintiff the property described in the schedule to the plaint, a house and bungalow bearing door No. 7, Kennet's Lane, Egmore. The plaintiff is the owner of the neighbouring property. On 22nd December, 1938, the first defendant who owned No. 7, Kennet's Lane, agreed to sell the property to the plaintiff for a consideration of Rs. 14,000 and received Rs. 301 by way of advance. A receipt (Ex. P-1) was executed by her, which said :

"I shall produce all the documents relating to the house and ground premises 7, Kennet's Lane, Egmore, Madras, for your and your legal adviser's perusal. If you are satisfied with the documents and the property the transaction may be concluded within a month . . . . If you are not satisfied with the bargain, I shall return back the advance amount of Rs. 301 to you. If there should be any delay on my part in the producing of the documents concerning the premises, I shall subject myself to any reasonable damages you might claim."

On 27th December, 1938, the plaintiff wrote to the first defendant complaining that no documents had been given to her till then and requesting the first defendant to expedite the production of the documents at once. On 29th December, 1938, the first defendant's husband who was then alive met the plaintiff's advocate Mr. V. Srinivasan with three documents, (1) a patta issued to Miss Rose Powney and Miss Victoria Powney by the Tahsildar of Madras in respect of the suit property, (2) another patta issued to Mrs. A. R. Barrass (first defendant) on 3rd May, 1937, by the same officer in respect of the same property, and (3) a registered will of Miss Victoria Powney dated 17th August, 1930. What happened at this meeting is a

*C. S. No. 49 of 1939. 5th November, 1941.

matter on which there is considerable difference between the parties, and I shall refer to it later. On the same day, namely, 29th December, 1938, but after the interview, the first defendant's husband wrote a letter (Ex. P-3) to the plaintiff in which, after referring to the interview with the latter's advocate, he stated :

"We could not come to any terms though he (the advocate) said that my papers are not satisfactory. He wants to have the will probated. This means a lot of expenses and the waiting for three or four months more. I told your advocate straightaway that I would not spend even a pie for the probate or the title deeds and encumbrance certificate. I should therefore tell you frankly that I have since changed my mind and do not want to sell the property as I find it involves heavy expenses and much worry. When I find it convenient to probate the will I shall do so. According to the receipt given, I have to return your advance of Rs. 300 (Rupees three hundred) only, if your advocate were to say my papers are not in order. He had told me so, and therefore kindly fix a day when you want to take back your advance and return me my receipt."

This letter was sent by registered post along with a money order for Rs. 300 to the plaintiff on 30th December, 1938. The letter and the money order were correctly addressed. But it is somewhat curious that they were not delivered to the plaintiff the next day. The letter was delivered only on the 3rd January, 1939, and the money order was tendered but rejected. On 31st December, 1938, Mr. V. Srinivasan, acting for the plaintiff, wrote a letter (Ex. P-4) to the first defendant. It states that the first defendant had agreed to produce all the documents relating to the suit property for his and his client's perusal, and that the transaction was to be concluded within a month. After referring to the interview between him and the first defendant's husband on 29th December, 1938, the letter states that the latter did not give any correct information and stated that the documents produced were the only documents the defendant had. The letter contained the following further statement :

"I told your husband that if he had not then with him all the documents he must according to the agreement produce all the documents and that if he did not do so my clients will on your account and expense get the same from the Registrar's office after 3rd January, 1939. Your husband took away those documents without leaving them with me.

This is therefore to confirm the aforesaid conversation and to ask of you whether your husband's statement that you have no other documents except two pattas and one registered will is correct. This is further to inform you that if you fail to produce all the documents and answer all relevant questions my client will get the documents and information on your account and debit you with the expenses thereof and the time taken to get those records will be excluded from the time fixed for the completion of the sale deed."

The letter concludes with the statement that the plaintiff expected an immediate reply to the letter and demanded the production of documents for the inspection of her advocate at his house at 2 P.M. on 3rd January, 1939. Another letter followed on 4th January, 1939, after the receipt of the first defendant's husband's letter of the 29th December. In this letter Mr. Srinivasan refused to take notice of the statement of Mr. Barrass (this is the name of the first defendant's husband) that he had changed his mind and after repeating the matters and threats contained in his letter of the 31st December, he concluded by saying that if the first defendant failed to comply with his demands the plaintiff would take steps for enforcing specific performance of the agreement. On 5th January, 1939, Mr. Srinivasan inserted a notice in "The Madras Mail" informing the public of the agreement in his client's favour dated 22nd December, 1938. On the same day, the first defendant wrote to Mr. Srinivasan (Ex. P-7) stating that inasmuch as he had inspected all the documents available with her and pronounced them to be not satisfactory to prove the title, she had changed her mind about the sale of the bungalow. This letter called forth a reply (Ex. P-8) from Mr. Srinivasan dated 10th January, 1939. In this reply Mr. Srinivasan stated that it was not correct to say that he had told her husband that the title was not satisfactory and that he only told her husband to produce all documents and that if he did not or could not produce all the documents, he would instruct his client to apply for the other documents at the first defendant's expense. He therefore refused to permit her to resile from the contract and insisted upon her acting up to the terms of the agreement and sending to him at once all available records with her. The letter concludes with a threat of suit if she did not comply with the demand. On the same day, 10th January, 1939, Mr. S. Srinivasaraghavan (not the plaintiff's advocate) acting under the instructions of Mrs. Barrass,

wrote a long letter setting forth the defendant's version. The letter stated that the advance of Rs. 301 was received and the receipt was granted on the understanding that the amount was to be repayable if the plaintiff's lawyer found the papers insufficient or inadequate to prove the defendant's title even though the property was in the possession and enjoyment of the defendant's paternal family for over hundred years. What happened at the interview of 29th December is contained in the following statement :

"Agreeably to your instructions Mr. Barrass took the papers for the inspection of your lawyer Mr. V. Srinivasan who in unequivocal terms stated that he was not satisfied with the papers in the possession of my clients and required them to produce other documents and to take out a probate of the will vesting the property in Mrs. Barrass. Naturally my clients were unwilling to incur any expense in respect of the negotiation for sale of their premises in question as you were previously warned."

Reference is then made to the notice published in "The Madras Mail" and it is complained that it had the effect of burdening the defendant with further costs on account of her having to undertake to probate the will "and incur sundry expenses for meeting the wishes of the vendee of the said property who was quite willing to purchase the said property originally but changed his mind on seeing the said publication of yours." The last statement suggests that the property had by then been sold to a third party, and it transpires that on the 31st December, 1938, there was an agreement by the first defendant and her husband to sell the property to the second defendant, followed by the execution and registration of a sale deed in the latter's favour on 7th January, 1939. Subsequent correspondence followed in which claims and counter-claims were urged, and it was also alleged that the second defendant was a purchaser with notice of the contract in plaintiff's favour. It is unnecessary to refer to this correspondence in detail. On the 3rd February, 1939, the first defendant filed a suit in the City Civil Court claiming damages against the plaintiff in the sum of Rs. 500 on account of the notice published in "The Madras Mail." The present suit was instituted on 23rd February, 1939.

The first defendant has filed a written statement in which she states that all the documents in her possession were produced for inspection to the plaintiff's advocate Mr. V. Srinivasan on 29th December, 1938, that he asked Mr. Barrass if the first defendant was willing to obtain probate of the will of Miss Victoria Powney and when he expressed reluctance, the plaintiff's advocate declared that the defendant had no title to the property. She then states that her husband thereupon took back all the title deeds produced by him and wrote his letter of the 29th December intimating that he had changed his mind. There are many other matters set out in the written statement. But it is unnecessary to refer to them for the purposes of the suit. The second defendant has filed a separate written statement in which he claims that he is a *bona fide* purchaser for value of the property without knowledge of the contract between the plaintiff and the first defendant.

The following issues were framed for trial :

1. Was the first defendant justified in rescinding the contract of sale, for the reasons set out in paragraph 9 of her written statement?

2. Is the second defendant a *bona fide* purchaser for value ignorant of the suit contract?

3. Is the plaintiff entitled to specific performance of the contract?

4. To what relief is the plaintiff entitled?

Issue No. 1.—The contract between the parties is contained in Ex. P-1 dated 22nd December, 1938. By whom this contract which is in English was drafted is not in evidence. But I accept the evidence of the defendant that she was taken to the plaintiff's house where she found the contract written and kept ready and that she received the advance and signed the writing there. According to the terms of the contract the first defendant bound herself to produce all the documents relating to the house and ground agreed to be sold for the perusal of the plaintiff and her legal adviser. There is no dispute that she did cause to be produced through her husband all the documents, at any rate, all the material documents in her possession before Mr. Srinivasan the plaintiff's advocate. The only documents that she did not

produce were certain municipal tax receipts, and the production of these receipts was not made a matter for complaint either in the correspondence or at the trial before me. Nothing therefore turns on their non-production. *Prima facie* it would seem that the defendant had fully performed her obligation in so far as the production of documents is concerned in the sense in which a layman would understand the provision in this regard contained in the contract. That those documents did not satisfy Mr. Srinivasan is scarcely disputed. Did he thereupon reject the title as bad or did he merely want further information with a view to making up his mind later is one matter which is in dispute between the parties. The evidence of Mr. Srinivasan as to what transpired between him and Mr. Barrass on 29th December, 1938, has been subjected to much adverse criticism, and I myself find it difficult to accept the whole of his evidence as correct.

[His Lordship discussed Mr. Srinivasan's evidence and the correspondence produced and proceeded] :

The position then comes to this that Mr. Srinivasan took the view that the papers produced on the 29th December did not make out a satisfactory title and told Mr. Barrass that the will of Miss Victoria Powney should be probated and that if he did not produce the necessary documents to complete the chain of title he was entitled to get them from the Registrar's office and debit the cost to the first defendant. Mr. Srinivasan has deposed that he did not accept the title of Mr. Barrass, until after she had instituted the suit in the City Civil Court.

The question arises whether the plaintiff was entitled to insist upon the will being probated and whether she was entitled to procure other documents at the expense of Mrs. Barrass for the purpose of satisfying herself about the latter's title to the property. If she was not entitled to either of these things, then it seems to me that her advocate Mr. Srinivasan was making requisitions which he had no right to make and insisting upon conditions which the first defendant was not bound to perform. It is urged however that the attitude of Mr. Srinivasan is justified by the law and I have been referred to a number of English decisions dealing with the rights and duties of sellers of real property in England. It seems to me more appropriate to refer to the Transfer of Property Act for information on the subject than to the English conveyancing law. Section 55 (1) (*b*) of the Transfer of Property Act states that the seller is bound to produce to the buyer on his request for examination all documents of title relating to the property which are in the seller's possession or power. As I have already mentioned such documents as were in Mrs. Barrass's possession were in fact produced for the inspection of Mr. Srinivasan, except the tax receipts with reference to which no complaint was made either in the correspondence or before me. But says Mr. Srinivasaraghavan, the learned advocate for the plaintiff, that it is the duty of the seller under this clause to produce documents making out a complete chain of title, and if he does not, it is open to the purchaser to secure public copies wherever they can be had and debit the cost to the seller. He accordingly argues that Mr. Srinivasan was only insisting upon what the plaintiff had a right to insist on in requiring either the production of the documents or calling upon the seller to bear the charges of his getting them. On a fair reading of the legal provision to which I have referred, it seems to me that the seller is not bound to do anything more than produce all such documents of title relating to the property which are in the seller's possession or power. Some of the documents of title may not be with the seller, and they may be for instance in the possession of a mortgagee or a trustee or some other person from whom they could be procured for the inspection of the buyer. The latter class of documents may be held to be in the power though not in the possession of the seller. But it is not suggested that in the present case there were any documents in the possession of a mortgagee or a trustee or in the possession of any person in circumstances in which it can be said that they were in the power of the seller. What is stated is that there may be some original sale deed of the property in favour of the ancestor of the first defendant Mr. Powney, and there may be other documents showing the descent or devolution of the property on his heirs and that it was within the right of the plaintiff to search for them in the office of the Collector or Registrar, and obtain

copies at the cost of the seller. I can find nothing in the language of the statute to warrant any such proposition. The same expression "possession or power" occurs in section 55, sub-section (3) where it is laid down that it is the duty of the seller after the receipt of the purchase money to deliver to the buyer all documents of title relating to the property which are in his possession or power. It is not necessary for me to consider the effect of this expression in this context or to see whether the words have the same meaning here as in section 55, clause (1) (*b*). The decision of Romer, J., in *Duthy and Jesson's Contract*, In re[1], was cited for the proposition that on an open contract the vendor must bear the expenses of obtaining title deeds required by the purchaser to be handed over on completion, although such title deeds are not in the possession of the vendor and not referred to in the abstract. The decision turned upon the construction of section 3, sub-section (6) of the Conveyancing and Law of Property Act, 1881, and the question was as to whether the seller was bound to obtain certain deeds deposited with the mortgagees whose debt had been paid off before the sale and hand them over to the purchaser after the completion of the conveyance. This is a totally different case from the one before me. A seller of property free of encumbrances is bound to have the encumbrances cleared and if they had been already cleared to produce the relative documents and hand them over to the purchaser. Whatever may be the scope of section 55 (3), I am not prepared to read section 55 (1) (*b*) as throwing upon the seller the burden of putting himself to the expense of procuring deeds not in his possession or power. Such a stipulation may be an express term of the contract in which event the position would be different. But this is not the case here.

Mr. Srinivasan must therefore be held to have taken an attitude which he had no right to take under the law, and his requisitions must be held to be unreasonable and such as were never contemplated between the parties when they entered into the contract. It was suggested that the statement in Ex. P-1 "I shall produce all the documents relating to the house" means that the first defendant undertook to produce all the documents necessary for making out the complete chain of title. I find myself totally unable to read the sentence in this way. It seems to me that if such was the intention, more definite language would have been employed. It is very difficult to imagine that the first defendant was willing to undertake such an indefinite and expensive burden. It is more reasonable to hold that she meant to do no more than what section 55 (1) (*b*) says that a seller must do in similar circumstances.

The contract says that if the plaintiff is satisfied with the documents and the property the transaction should be concluded within a month. But if she was not, the defendant should return back the advance amount received by her. It was vehemently argued that the first defendant in this case acted *mala fide* and entirely without justification in rescinding the contract by the letter of 29th December, 1938, written on her behalf by her husband followed by her own letter of 5th January, 1939. The decisions in *Quinion* v. *Horne*[2] and *Des Reaux and Setchfield's Contract*, In re,[3] which were cited in this connection proceed upon the terms of the particular contract before the Court, and neither of them is authority for the proposition that the plaintiff was entitled in circumstances such as those present here to insist upon the defendant taking out probate of the will of Miss Victoria Powney or procure other documents none of which were in her possession or power at the date of the contract. The clause in the contract which says that the defendant is entitled to return back the advance amount if the plaintiff was not satisfied with the bargain appears to be the rescission clause. The first defendant it seems to me was entitled to rescind the contract when she found that the plaintiff was not satisfied with the title on the documents which were produced and which alone the defendant was bound to produce and further when the latter found that the plaintiff's lawyer was insisting upon the performance of the terms and conditions to which she had never agreed. There is nothing in this case to suggest that she made any misrepresentation or

1. (1898) 1 Ch. 419.
2. (1906) 1 Ch. 596.
3. (1926) 1 Ch. 178.

acted in a reckless or misleading way towards the plaintiff. Indeed she had done her best to comply with the obligations which by the contract she had undertaken towards the plaintiff. When that is the case the principle to be applied is contained in the following observations of Romer, J., in the second of the two cases cited :

"I can well understand that where on a closer examination of the title it appears that there is some blot on it which was unknown and unsuspected by the vendor, even although that blot can be removed by the expenditure of a comparatively small sum of money, it may be quite reasonable for him to rescind the contract if the purchaser insists upon that expenditure being incurred."

In this case there is no proof whatever of any blot in the title and there has been no withholding of any document by the seller. By the unreasonable demands on her by Mr. Srinivasan, she was faced with a situation which meant delay and expense for her. In my opinion she rightly rescinded the contract which she was entitled to do in the circumstances. My finding on issue No. 1 is accordingly in the affirmative.

Issue No. 2.—This issue raises the question whether the second defendant who subsequently bought the property from the first defendant was a *bona fide* purchaser for value in ignorance of the suit contract.

(His Lordship discussed the evidence of the second defendant and found on this issue in the negative.)

Issue No. 3.—In view of my finding on issue No. 1 the plaintiff must be held not entitled to claim specific performance of the contract.

Issue No. 4.—The suit must be and is dismissed with the costs of the first defendant. The second defendant has failed in his defence and must bear his own costs.

K.S. *Suit dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

G. V. Krishnamurthi Ayyar .. *Appellant** (*Accused-Prisoner*).

Criminal Procedure Code (V of 1898), section 235—Joint trial on three separate charges—Plea of guilty to third charge—First two charges for offences committed in the same transaction—Trial not illegal.

In a joint trial for three separate charges, two being under section 409, Indian Penal Code and one under section 467, the accused pleaded guilty to the third charge and the other two were tried together.

Held, that no illegality was committed because there were three separate charges and the trial proceeded only on the first and second charges which related to offences committed in the same transaction and which under S. 235, Criminal Procedure Code, could be tried together.

Appeal against the order of the Court of the Additional Sessions Judge of the Court of Session of the Coimbatore Division in Case No. 15 of the Calendar for 1942.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

Appellant not represented.

The Court delivered the following

JUDGMENT.—The appellant was convicted by the Additional Sessions Judge of Coimbatore of two offences punishable under section 409, Indian Penal Code and one offence punishable under section 467, Indian Penal Code and sentenced to 3 years' rigorous imprisonment, the sentences to run concurrently.

The accused pleaded guilty to the third charge ; otherwise the trial would have been illegal. Under section 233 of the Criminal Procedure Code, every distinct offence has to be the subject of a separate charge ; and every charge has to be tried separately except in the cases referred to in sections 234, 235, 236 and 239. There is no section following section 233 which permits the trying together of three cases like those with which the accused was charged. There could be a joint trial on the first two charges because they formed part of the same transaction. Presumably, the learned Sessions Judge tried these three cases together because they were committed within the course of 12 months ; but section 234 permits of the joint trial of offences committed within 12 months only if they are of the same kind. Of the three offences with which the accused was charged, only two were of the

---

*Cr. App. No. 290 of 1942. 1st September, 1942.

same kind. However, no illegality was committed because there were three separate charges, and the trial proceeded only on the first and second charges, which relate to offences committed in the course of the same transaction ; and that was permissible under section 235.

This appeal would have been dismissed *in limine* were it not for the fact that the judgment of the Additional Sessions Judge does not indicate that there was any evidence that the appellant forged the valuable security in question. The question of forgery is dealt with in paragraph 5 of the judgment ; and although it is clear enough that the endorsement on Ex. B was not written by P. W. 2, there is no reason to think that the endorsement was written by the accused himself, although it was undoubtedly written for his benefit. I do not, however, think it necessary to consider whether the accused forged it himself or got it forged, because the sentences for the three offences were made to run concurrently ; so that whether the conviction for forgery stands or not, the appellant will have to serve the same term in jail.

The sentence is not excessive, whether it be regarded as one for using a forged document, or whether it be regarded as one for misappropriating the sum of Rs. 3,300.

The appeal is dismissed.

K.C. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

District Magistrate of Cuddapah .. *Referring Officer** (*Petitioner*)

v.

Syed Abdul Kareem .. *Accused* (*Accused*).

Criminal Procedure Code (*V of 1898*), *section 346* (*1*)—*Complaint to magistrate having no jurisdiction —Should be returned to complainant for presentation to the magistrate having jurisdiction and not forwarded to immediate superior under section 346* (*1*) *of the Criminal Procedure Code.*

When objections are raised during the trial that the Collector should have filed the complaint himself and that he had no power to delegate that right to the Revenue Divisional Officer and that the Sub-Magistrate did not have jurisdiction and the objections are correct, the Sub-Magistrate should return the complaint for presentation to the Magistrate having jurisdiction and not forward the papers to his immediate superior under section 346 (1) of the Criminal Procedure Code.

Petition praying that in the circumstances stated in the letter of Reference, Ref. C-1 No. 162-42, dated 5th July, 1942, from the District Magistrate, Cuddapah, the High Court will be pleased to issue an order to quash proceedings in C. C. No. 4 of 1942 on the file of the Court of the Stationary Sub-Magistrate, Prodattur.

K. Srinivasa Rao for Accused.

A. S. Sivakaminathan for the Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—The accused is said to have made a false allegation against a certain Taluk Office clerk that he demanded a bribe. The Collector, who was the superior officer of the clerk concerned, thought that the accused should be prosecuted and ordered the Revenue Divisional Officer to file a complaint.

Two objections were raised during the trial. One was that the Collector should have filed the complaint himself and that he had no power to delegate that right to the Revenue Divisional Officer. The second ground was that the complaint should have been made to the Sub-Magistrate having jurisdiction at the place where the Collector received the letter. Both these contentions are correct, but the Sub-Magistrate, instead of returning the complaint for presentation to the Magistrate having jurisdiction, forwarded the papers to his immediate superior, the Sub-Divisional Magistrate, Jammalamadugu, under section 346 (1) of the Criminal Procedure Code. This was not the proper

*Cr. M. P. No. 395 of 1942. 18th August, 1942.

way to dispose of the matter, and so the District Magistrate referred the matter to this Court.

The reference is accepted and the proceedings of the Sub-Magistrate set aside. He must return the complaint to the complainant.

K.S. ——— *Reference accepted.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HAPPELL.

T. Kunhi Pakki and another .. *Petitioners* (Accused).*

Practice—Revision—Duty of Court—Defence of India Rules (1939), rules 81 (4) and 81 (2) (b)*—Sale of kerosene above price fixed—Not an offence on the date when the sale was effected—Later amendment of rules making it an offence—Revision against sentence.*

Where the petitioners had been punished for doing an act, namely, selling kerosene at above the price noted by the Collector, which at the time when they did it was not an offence under the Defence of India Rules and this fact was brought to the notice of the Court having revisional jurisdiction,

Held, that it was the duty of the Court to interfere, because a person had been convicted and sentenced for doing an act which was not an offence on the date it was committed.

In re *Chockalingam Chetty and others*, (1943) 1 M.L.J. 20, relied on.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the judgment of the Court of Session of North Malabar Division in C. A. No. 10 of 1942, preferred against the judgment of the Court of the Sub-Divisional Magistrate of Tellicherry in C. C. No. 60 of 1942.

C. K. Viswanatha Aiyar for Petitioners.

N. Somasundaram for the Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—The petitioners have been convicted by the Sub-Divisional Magistrate of Tellicherry for an offence under section 81 (4) read with section 81 (2) (*b*) of the Defence of India Rules and have been sentenced each to pay a fine of Rs. 150. On appeal to the Sessions Judge, North Malabar, the convictions were confirmed but the sentences were reduced to fines of Rs. 100.

The offence with which the petitioners were charged and of which they were convicted was selling kerosene at a price above that notified by the Collector. The sales which were said to have constituted the offence, it is important to note, were made on 6th July, 1942. On 18th July, 1942, rule 81 (4) of the Defence of India Rules was amended by the substitution of "orders made under this rule" for "any of the provisions of this rule." Byers, J., has held in In re *Chockalingam Chetty and others*[1] that the sale of articles at prices higher than those noted by the Collector under rule 81 (*b*) was not an offence. This decision has not been challenged by the learned Public Prosecutor before me. It has however been contended that since this point, namely, that the sale of kerosene on the date on which it was sold at a price higher than the controlled price did not constitute an offence, was not taken either in the trial Court or in the lower appellate Court, there is no necessity for interference in revision. I am unable to accept this contention. The petitioners may richly have deserved the fines which were imposed on them ; but that is not the point. The petitioners have been punished for doing an act, namely, selling kerosene at above the price noted by the Collector, which at the time when they did it was not an offence ; and when it is brought to the notice of a Court having revisional jurisdiction that a person has been convicted and sentenced for doing an act which is not an offence, it is, in my opinion, the duty of the Court to interfere.

The petition is therefore allowed and the convictions and sentences passed on the petitioners are set aside.

K.C. ——— *Petition allowed.*

---

*Crl. R. C. No. 49 of 1943.
(Crl. R. P. No. 46 of 1943). 18th March, 1943.

1. (1943) 1 M.L.J. 20.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ABDUR RAHMAN.

Vakacherla Venkatasubbamma and another .. *Appellants** (*Defts. and Nil*)

v.

Gobbooru Subbiah .. *Respondent* (*Plaintiff*).

Registration Act (XVI of 1908 as amended), sections 17 and 49—Letter containing contract to sell—Suit for specific performance—Admissibility of letter in evidence—Bar under sections 17 and 49 whether applicable.

In a suit for specific performance of a contract to sell certain immovable properties exceeding Rs. 100 in value the plaintiff relied on a letter passed to him by the defendant in the following terms: "For payment of circar cists and for family necessity I have borrowed from you Rs. 300. For this money I agree to sell the schedule mentioned properties to you and execute the sale deed on a proper stamp and get it registered. If I fail to do so you should treat this letter itself as a sale deed, get into possession of the properties and enjoy them with rights of gift and sale, etc." It was contended on behalf of the defendant that the letter was inadmissible in evidence as it created an interest in immovable property of more than Rs. 100 in value and was not in writing registered.

Held, that under section 49 of the Registration Act as amended by Act XXI of 1929 the letter could be received in evidence to prove the contract between the parties, and the portion containing the agreement to sell could also be referred to by the Court.

Held, further, that the suit for specific performance on the basis of the letter was maintainable and that the letter did not itself amount to a conveyance.

Thayarammal v. *Lakshmi Ammal*, (1920) 39 M.L.J. 181 : I.L.R. 43 Mad. 822 and *Satyanarayana* v. *Chinna Venkatarao*, (1925) 50 M.L.J. 674 : I.L.R. 49 Mad. 302, referred to.

Appeal against the decree of the District Court of Cuddapah, dated 18th November, 1940, and passed in A. S. No. 22 of 1940 preferred against the decree of the Court of the District Munsiff of Nandalur in O. S. No. 379 of 1938.

Ch. Raghava Rao and *G. C. Venkatasubba Rao* for Appellants.

Kasturi Seshagiri Rao for Respondent.

The Court delivered the following

JUDGMENT.—A suit for specific performance of a contract to sell certain immovable properties exceeding Rs. 100 in value was instituted by the plaintiff. It was dismissed by the District Munsiff of Nandalur on the ground that the document (Ex. A) on the basis of which it was brought was not an agreement to sell on which a suit for specific performance could be founded but a sale deed that was inadmissible in evidence for want of registration. On appeal, the learned District Judge of Cuddapah did not accept this view. Having regard to the specific recitals in the document, he found it to be an agreement to sell and in the absence of any express words of conveyance he declined to hold it to be a sale deed. The plaintiff's suit was accordingly decreed. The defendant has preferred this second appeal.

Since a great deal would depend upon the terms of the letter Ex. A, it may be reproduced *in extenso* :

Dated 25th April, 1938.

"To

Raja Sree Gubboru Subbayya Garu, son of Seshayya Garu.

For payment of circar cists and for family necessity, I have borrowed of you Rs. 300 (three hundred only).

A-1. (For this money by the 25th May, I agree to sell the schedule mentioned properties to you and execute the sale deed on a proper stamp, and get it registered.)

A-2. (If I fail to do so, you should treat this letter itself as a sale deed, get into possession of the properties and enjoy them with rights of gift and sale, etc.) This is the letter executed with my consent."

There can be no manner of doubt that the second sentence in Ex. A (and marked A-1 by me) contains an express agreement to sell the property in consideration of a sum of Rs. 300 which was acknowledged to have been borrowed by Chenchiah from the plaintiff. It is conceded by Mr. Raghava Rao, learned counsel for the appellant, that no exception could have been taken to the decision of the learned District Judge if the document had ended here. He contends, however, that in view of the following sentence (and marked A-2 by me) where the parties had

*S. A. No. 768 of 1941. 2nd April, 1942.

agreed to treat this letter itself as a sale deed in the event of Chenchiah's failure to execute one within the time mentioned by him in this letter, Ex. A must be regarded to be a sale deed under which title to the property must have been intended to be conveyed in favour of the respondent from the date on which it was executed, or at all events, as one purporting to create a future or contingent right or interest in immovable property of more than Rs. 100 in value and that in either case, it would not be admissible in evidence.

I shall deal with this contention later. But it seems to me that the objection taken to the admissibility of the document which is being pressed before me and which was perhaps discussed before the trial Court during the final arguments of the case is different from what was raised in the pleadings filed on behalf of the defendant. In reply to a suit for specific performance, it was urged on behalf of the defendant in the trial Court that the plaintiff could not maintain the suit upon an unregistered document. Whatever might have been the law before 1929, the proviso added to section 49 of the Indian Registration Act by the Amending Act XXI of 1929 expressly provides that an unregistered document affecting immovable property may be, even if not registered, received in a suit for specific performance as evidence of a contract. The fact therefore that Ex. A is not registered cannot prevent its portion (A-1) from being admitted in evidence in the present suit which is one for specific performance. The portion A-1 is absolutely clear and provides ample evidence of an agreement by Chenchiah to sell the properties mentioned in the letter. The objection therefore that the plaintiff cannot maintain the suit upon an unregistered instrument must fail unless the portion A-1 can be found to have become inadmissible in evidence because it happens to be embodied in a document which would not be admissible unless it was registered. This is on the assumption that the portion marked A-2 falls within section 17 (1) (*b*) of the Indian Registration Act. It is not possible, however, to hold that the clause A-1 containing an agreement to sell can, in view of the proviso to section 49, be ignored on that account. Ex. A must be for that purpose regarded to be a composite document and the clause A-1 is easily detachable from the rest. I must therefore hold that the portion A-1 would be admissible in evidence if the main contention advanced by learned counsel for the appellant before me is not permitted to be raised or does not prevail if so permitted.

Mr. Raghava Rao's contention, if carefully analysed, is that in so far as the words in the clause marked A-2 amount to a conveyance, this portion must be held to be inadmissible in evidence under section 17 (1) (*b*) of the Registration Act. The second step in the argument is that as the terms of the contract were reduced to writing no other evidence could under section 91 of the Indian Evidence Act be permitted. And the third and final step is that as the clause relating to the agreement to sell must be taken to have merged in the conveyance, the only remedy available to the plaintiff was to get the conveyance registered but if he did not pursue that remedy, he must be found to have lost his right to enforce the agreement to sell.

I must say at once that the third and final step in the argument cannot, in my opinion, be permitted to be advanced as the plea of merger, which forms the foundation for this contention, was never raised by the defendant in her written statement. Inasmuch as the question whether the agreement to sell contained in A-1 had ceased to exist was one of intention of the parties to the contract, and being one of fact or in any case one of mixed law and fact, it should have been specifically raised in the written statement. But even if it were not so, I am not impressed by the contention.

It must be remembered that the plaintiff is not trying to enforce the contract of sale contained in A-2 as distinguished from what is found in A-1. He is suing for specific performance of a contract to sell and does not therefore need to give evidence as to the terms of the sale as alleged to be stated in A-2. For this purpose, so far as this case is concerned, it is needless to refer to A-2 altogether. From that point of view, it is unnecessary to find whether A-2 is admissible in evidence or otherwise. Moreover, if the title to the property has not passed in favour of the plaintiff, as contended by learned counsel for the appellant, by what is contained

in A-2—it being inadmissible in evidence according to learned counsel—why should it be impossible for the plaintiff to enforce specific performance of Chenchiah's contract to sell the property to him. Sale deeds do not usually come into existence unless the parties have agreed to sell and purchase properties described in them. But this Court has been consistently taking the view that an agreement to sell cannot be spelt out of a sale deed and cannot form the basis of a suit for specific performance (see *Venkataswami* v. *Krishtayya*[1], *Thayarammal* v. *Lakshmi Ammal*[2] and *Satyanarayana* v. *Chinna Venkatarao*[3]). I cannot therefore go beyond those decisions. But an agreement to sell is not being spelt by me in this case out of what has been described (and wrongly described in my opinion) to be an unregistered sale deed A-2 in order to found the suit for specific performance. I can safely ignore A-2 and depend for that purpose on A-1 alone. This contains an express agreement to sell.

It has been contended however that I cannot look at A-1 either and the only remedy left for the plaintiff was to present Ex. A (as it contained A-2) for registration. If he failed to avail himself of that remedy, so argued learned counsel for the appellant, the present suit must fail. Reliance was placed in this connection on *Satyanarayana* v. *Chinna Venkatarao*[3]. But that decision does not support the appellant. I am not adopting what was characterised by the learned Chief Justice in that case "as a very vicious method of construction," in referring to a lease or a sale deed with the object of inferring an agreement of sale or lease from them after they have been found to be legally inoperative. Nor do I propose to question the soundness of the decision that the only remedy left for a person who has presented a lease or sale deed for registration is to bring a suit under section 77 of the Registration Act, if a Registrar has, on a denial of its execution, refused to register the same and not to sue for specific performance of a contract. But this case is no authority for the proposition that a person is debarred from bringing a suit for specific performance even when he has not accepted the sale deed executed by his vendor and has not consequently resorted to the machinery prescribed by the Registration Act for its registration.

My attention was next drawn to a Division Bench decision of this Court in *Venkadari Somappa* v. *The Official Receiver, Bellary*[4], where it was held that an unregistered document of transfer was not of itself sufficient to support a suit for specific performance of an agreement to transfer but in that case the agreement was not, as pointed out by me in *Nidasanametla Venkata Seshayya* v. *District Board, East Godavari*[5], distinct from the deed of transfer itself. It may be that in the absence of a specific agreement to sell a property, it is not possible in this presidency to regard an unregistered sale deed as sufficient to support a suit for specific performance of a contract to sell. But it does not follow that an express contract to sell must necessarily be regarded to have merged in a sale deed, when that deed is not accepted by the vendee or happens to be incomplete in regard to its terms or is otherwise legally inoperative. The learned Judges were apparently contemplating a case where there was no express agreement of transfer and the deed of transfer was a complete document and executed and accepted as such by the vendee.

This takes me to Ex. A. There is nothing in this letter which would show that the plaintiff had agreed to accept it as a sale deed. This could be, at the most, regarded to be Chenchiah's request but nobody knows whether it was accepted by the plaintiff. And that is where the difficulty of want of a definite plea arises. The fact that the plaintiff has chosen to bring it as a suit for specific performance would go to show that he had not agreed to accept it as a sale deed. There are no express words of conveyance in that document and it is not easy to accept the contention that the plaintiff must have become satisfied for his title to the properties with what is contained in A-2. In the absence of any definite words of conveyance

1. (1893) 3 M.L.J. 169: I.L.R. 16 Mad. 341.
2. (1920) 39 M.L.J. 181: I.L.R. 43 Mad. 822.
3. (1925) 50 M.L.J. 674: I.L.R. 49 Mad. 302.
4. (1938) 2 M.L.J. 362.
5. (1939) 1 M.L.J. 82.

by Chenchiah of his title to the properties, the first two steps in the argument must also fall to the ground.

For the above reasons, the appeal fails and is dismissed with costs.

Leave refused.

B.V.V. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNASWAMI AYYANGAR AND MR. JUSTICE KUNHI RAMAN.

W. Sivaraj Lal .. *Appellant** (*Plaintiff*)

v.

The Mylapore Hindu Permanent Fund, Limited, South Mada Street, Mylapore, by its Secretary, Brahmanandam and others .. *Respondents* (*Defendants*).

Mortgage with possession and lease back to mortgagor—Rents not collected—Mortgagee if liable to account on the basis of wilful default—Transfer of Property Act (IV of 1882), section 76.

The liability of a mortgagee to account on the footing of wilful default arises only in a case where the mortgagee takes actual possession and control over the mortgaged property and intercepts the rents from going to the mortgagor ; but where the mortgagor is himself allowed to remain in possession as a tenant under a lease deed in favour of the mortgagee, the rental agreement notwithstanding the mortgagee is to be deemed not to have taken possession of the mortgaged property so as to charge him with a liability for the uncollected rents and profits.

Madhwa Sidhanta Onahini Nidhi, Ltd. v. *Venkataramanjulu Naidu,* (1903) I.L.R. 26 Mad. 662 (F.B.), followed.

Appeal against the decree of the Court of the City Civil Judge, Madras, dated 4th November, 1940 and passed in O. S. No. 358 of 1937.

T. R. Venkataraman for Appellant.

A. Venkatasubba Mudaliar and *A. Rajah Bahadur Mudaliar* for Respondents.

The Judgment of the Court was delivered by

Krishnaswami Ayyangar, J.—The appellant, a puisne mortgagee, holds a simple mortgage executed in his favour on 21st April, 1922, by the second respondent over his house and ground No. 43, Veeraraghava Mudali Street, Triplicane. In this the sons of the second respondent also joined. The principal amount secured by the mortgage is stated to be Rs. 7,000. But in fact, the appellant had advanced only Rs. 3,400. The earlier mortgage was a possessory one and also contained a power of sale. This mortgage had been executed on 31st October, 1920, the mortgagee being the Mylapore Hindu Permanent Fund, Limited. The principal amount secured by the mortgage was Rs. 4,000. Default having been made in the due payment of the mortgage money as stipulated in the deed, the Fund exercised its power of sale and sold the property at an auction held on 5th June, 1926. The sale fetched Rs. 5,750 out of which Rs. 120 went towards the expenses of the auction, Rs. 84-10-0 towards the municipal tax and quit rent due on the property. A sum of Rs. 5,473-15-0 was appropriated in satisfaction of the principal and interest due to the mortgagee. There remained only a balance of Rs. 71-12-2 which the first respondent has always been ready and willing to pay over to the appellant. The appellant instituted the suit out of which this appeal has arisen praying for a decree directing the Fund to render an account of the various sums of money which had or should have been realised by it by way of rents, profits, and incomes, when the mortgaged property was in its possession and for the recovery of the surplus amount in its possession to be ascertained on such accounts being taken. According to the plaint, the liability of the Fund to render accounts arose on account of its having during the continuance of the mortgage, taken possession of the property within the meaning of section 76 of the Transfer of Property Act, 1882. The learned City Civil Judge has declined to grant this relief, but has given a decree for Rs. 71-12-2 which is the only surplus amount in the hands of the first respondent according to its case. The main question raised in the appeal is whether the first respondent, the

*C. C. C. A. No. 10 of 1941. 31st July, 1942.

Fund, who is the first mortgagee, is liable to render an account of the rents and profits of the mortgaged property which it should have collected but did not, in fact, collect during the period of its alleged possession; in other words, whether the Fund is liable to render accounts on the footing of wilful default in respect of the rents which could have been, but were not collected by it.

A few more facts are necessary to appreciate the contentions raised. The mortgage in favour of the first respondent, the Fund, was termed a possessory mortgage in the deed and contains the statement that by mortgaging the property with possession and on his own personal liability as well, the mortgagor received a loan of Rs. 4,000 and bound himself according to the rules of the Fund to pay interest on the principal sum at the rate of Rs. 0-8-4 per cent. per mensem, amounting to Rs. 20-13-4 before the end of each month. Clause 2 of the deed provides the machinery by which the interest was to be paid and received. The clause is as follows:

"As I myself have to pay the interest on the said loan as aforesaid, the said Fund shall let out the mortgaged properties for rent and credit the rent received every month towards the interest payable every month. In the event of the said rent being insufficient to cover the interest or the said house not being occupied by any tenant, or the said house being let out to me, and the rent not having been paid by me, I shall be bound to pay the interest accrued due on the principal amount together with interest thereon, at the rate of two pies per rupee per mensem. The mortgaged properties have been given as security by means of this bond even for the repayment of the said monies."

This provision leaves the mortgagee free to let the house on rent either to the mortgagor or to any other stranger of its choice. In the event of the property being leased to a stranger and the rent being insufficient to cover the interest the mortgagor bound himself to make good the deficiency together with interest on interest at the rate of two pies per rupee per mensem. The mortgagor also undertook a similar liability even in the event of the property not being tenanted or in case it was leased to himself and he neglected to pay the rent. In clause 3, the mortgagor bound himself to pay the principal amount before 30th April, 1927, or such other date as may be fixed by the directors under rule 41 of the Fund. If on the date of payment the interest remained in arrears, the same was to be paid together with interest at the rate of two pies per rupee per mensem. The mortgagor further undertook to pay out of his own monies the municipal tax, quit rent and all other taxes payable in respect of the mortgaged property irrespective of the property being in the possession of the Fund or in the possession of the mortgagor himself. It is obvious from these clauses as well as from what appears in clause 4 of the mortgage deed that the parties contemplated the mortgagor himself being allowed to occupy the property as a lessee from the Fund. Accordingly a rental agreement was executed by the mortgagor in favour of the mortgagee simultaneously with the execution of the mortgage instrument itself. It would be remembered that the sum of Rs. 20-13-4 is the monthly interest payable by the mortgagor at the rate of Rs. 0-8-4 as per the stipulations of the mortgage deed. The lease deed recites that the property was taken on lease by the mortgagor from the mortgagee, the rent being settled at Rs. 20-13-4 per mensem which is precisely the interest due on the mortgage. The mortgagor also undertook to vacate and deliver possession of the property to the Fund on one month's notice being given. It may at once be stated that it is common ground that the mortgagee failed and neglected to enforce due payment of the rent stipulated.

The contention of the appellant, based on the two transactions, namely, the mortgage and the lease, is that the mortgagee must be deemed to have taken possession of the mortgaged property within the meaning of section 76 of the Transfer of Property Act, 1882, and the Fund was accordingly bound to use its best endeavours to collect the rents and profits, its default in this respect carrying with it, the consequence set out at the end of the section, namely, that when accounts are taken under the mortgage decree the Fund should be debited with the loss occasioned by the omission. The Fund answers by stating (1) that the liability of a mortgagee to account on the footing of wilful default, which is of course in consequence of the duty placed on it by clause (*b*) of the section, arises only in a case where the mortgagee takes actual possession and control over the property and intercepts the

rents from going to the mortgagor; but this is not the case if the mortgagor is himself allowed to remain in possession as a tenant under a lease or an attornment clause in favour of the mortgagee; (2) that the section only governs the relationship between the mortgagor and the mortgagee and not between a prior and puisne encumbrancer, the latter having no higher rights than the mortgagor himself; that is to say, where the mortgagor has no right to call upon the mortgagee to render accounts on the footing of a wilful default, the puisne encumbrancer deriving his title from him is subject to the same disability.

The learned City Civil Judge in upholding the contention of the Fund supported himself by the decision in *Madhwa Sidhanta Onnahini Nidhi, Ltd.* v. *Venkataramanjulu Naidu*[1], of White, C.J., and Subramania Ayyar and Davies, JJ. There as here, there was a possessory mortgage executed simultaneously with a rental agreement by the mortgagor in favour of the mortgagee. The mortgagor let the rents to fall into arrears. The mortgagee instituted a suit on the mortgage impleading not merely the mortgagors and his sons but also the representative of the puisne mortgagee. The trial Judge dismissed the suit on the ground that on a proper construction of the two instruments the plaintiff was not entitled to sue for the mortgage money or to ask for the sale of the property. The appeal preferred by the plaintiffs was contested by the puisne mortgagee and two of the sons of one of the mortgagors. It may be mentioned that the facts were on all fours with those present here. There was there, as here, a possessory mortgage and a rental agreement simultaneously executed with terms practically identical with those in the instrument arising for consideration in this appeal. It also appears that the mortgagors made default in the punctual payment of the rents as stipulated in the rental agreement. The Court held that the two instruments should be read together constituting as they did parts of one and the same transaction and that the intention was that the rights and obligations of the parties were to be gathered from the provisions of both. So doing, the Court expressed the opinion that the transaction was one entirely of mortgage, with an express covenant to pay the principal and interest in instalments and conferring a power on the mortgagee to take possession of the property mortgaged and apply the usufruct in the discharge of the interest and principal. It was next observed that these findings brought the case within the ruling of the Privy Council in *Juggewundas Keekshaw* v. *Ramadas Brijbookundas*[2], in which the Privy Council made a distinction between cases where there was a binding contract by which the mortgagee was under the duty to apply the rents and profits to the payment of the debt in which case the omission to collect the rents and profits would render him liable to the extent of the rents and profits unreceived during the period when he was in possession, and the case where the mortgage deed simply confers a power not a duty to take possession and collect the rents and profits and apply the same towards the satisfaction of the mortgage debt. The Privy Council pointed out that in the latter case the omission to collect the rents and profits from the mortgagor left in possession under the lease would make no difference as between the mortgagee and the mortgagor, that is to say, notwithstanding such omission, the mortgagee would be entitled to recover the whole of the principal and interest due on the mortgage. A different result would, it was pointed out, follow in so far as a second or a later encumbrance is concerned if after notice of his encumbrance the mortgagee permits the mortgagor to receive the rents and profits, that is to say, the mortgagee would be liable to account for the rents and profits which he failed to collect from the mortgagor after notice of the puisne mortgage. This consequence, it is clear, would only follow if after taking possession the mortgagee neglected to realise the rents, but not where he never took possession himself. Applying the Privy Council decision to the facts before the Court the learned Judges held that the liability of the mortgagor to repay the entirety of the debt to the mortgagee was too clear for discussion. As regards the position between the mortgagee and the puisne encumbrancer they made the following observation:—

"The question as between the mortgagee and puisne encumbrancers also is equally clear, since

1. (1903) I.L.R. 26 Mad. 662 (F.B.). 2. (1841) 2 M.I.A. 487.

the former, not having taken possession of the mortgaged property, there is no scope for the application of the rule as to a mortgagee in possession being liable to account for the consequences of his wilful default and the doctrine of notice to which frequent reference was made in the argument."

The meaning of these observations is beyond question, namely, the rental agreement notwithstanding the mortgagee was deemed not to have taken possession of the mortgaged property so as to charge him with a liability for the uncollected rents and profits.

The case would thus appear to fall within the decision cited above. But the learned advocate for the appellant has boldly argued that this decision is no longer law, in view of later decisions of the highest tribunal which according to him have interpreted such transactions in a different sense altogether.

The three decisions of the Privy Council to which reference has been made are those in *Abdulla Khan* v. *Basharat Husain*[1], *Feroz Shah* v. *Sohbat Khan*[2] and *Commissioner of Income-tax, Bihar and Orissa* v. *Maharajadhiraja of Dharbanga*[3]. In *Abdulla Khan* v. *Basharat Husain*[1], it would appear that the mortgagee took possession of the mortgaged property in pursuance of a term contained in the mortgage deed to the effect that the profits of the property should be taken in lieu of the interest on the mortgage money and the Court held that whatever the income received by the mortgagee he was not accountable in respect of it to the mortgagor. This was the actual decision arrived at by the Board. But the Judicial Committee referred to the erroneous view taken in the High Court to the effect that in spite of the mortgage being usufructuary in form it was merely intended as a simple mortgage carrying interest at the rate of six per cent. Their Lordships pointed out the error of this view and stated that the mortgage and the lease were parts of one and the same transaction; but there was no inconsistency between the two, nor would there have been any inconsistency if the mortgage itself had contained a provision for granting a lease on the terms upon which the lease was actually granted. In *Feroz Shah* v. *Sohbat Khan*[2], there was a possessory mortgage accompanied by a lease back of the mortgaged property to the mortgagor in possession for the period of the lease. At the termination of the period, the mortgagee sued for recovery of possession of the property from the mortgagor. He was met by the plea that the transaction evidenced by the two documents really amounted to a simple mortgage and he could not therefore demand possession. The Court of the Judicial Commissioner of the North-West Frontier Province having upheld this objection, an appeal went up to the Privy Council. The judgment of the Judicial Commissioner was reversed and the Privy Council pointed out that there is nothing suspicious in a transaction evidenced by two documents, namely, a possessory mortgage and a lease back and there was no reason to construe the mortgage as other than a possessory mortgage entitling the mortgagee to possession. It was pointed out that the mere absence of a formal handing over of the land to the mortgagee, and handing back by him to the mortgagor in the character of lessee, is a circumstance of little consequence. In *Commissioner of Income-tax, Bihar and Orissa* v. *Maharajadhiraja of Dharbanga*[3] the question which arose for consideration was whether the profits or income of agricultural lands leased to a money-lender on a zarpeshgi usufructuary mortgage constituted agricultural income not assessable under the Income-tax Act, the contention being that it was really interest received upon a mortgage of the property in question and accordingly formed part of the taxable profits or gains of the money-lending business of the plaintiff. Their Lordships held that the profits received by the mortgagee were agricultural income and not interest. These cases do not, in our opinion, lend any support to the appellant's contention that the decision in *Madhwa Sidhanta Onnahini Nidhi, Ltd.* v. *Venkataramanjulu Naidu*[4] is inconsistent with them or has been rendered untenable in any way.

1. (1912) 25 M.L.J. 91 : L.R. 40 I.A. 31 : I.L.R. 35 All. 48 (P.C.).
2. (1933) 65 M.L.J. 150 : L.R. 60 I.A. 273 : I.L.R. 14 Lah. 466 (P.C.).
3. (1935) 69 M.L.J. 474 : L.R. 62 I.A. 215 : I.L.R. 14 Pat. 623 (P.C.).
4. (1903) I.L.R. 26 Mad. 662 (F.B.).

The English authorities do not appear to be uniform on the question under consideration. But the preponderance of opinion is certainly in favour of the view that a mortgagee does not render himself liable to account as a mortgagee in possession to subsequent encumbrancers merely because of an attornment clause under which the mortgagor continues to remain in actual occupation, though as a tenant for the mortgagee. (*See* Fisher and Lightwood on ' Mortgage ', 7th edition, pages 721 and 722.). In 23 Halsbury at page 363 the following statement of law occurs :

> " Where the mortgage deed creates a tenancy in the mortgagor under the mortgagee at a rent, this does not put the mortgagee in possession so as to make him liable to account to subsequent encumbrancers for the amount of the rent reserved."

In *Stanley* v. *Grundy*[1], which is a direct decision on the point, Bacon, V.C., treated the observations in the earlier cases in Re *Stockton Iron Furnace Co.*[2] and Ex parte *Harrison* : In re *Betts*[3] as merely containing *obiter dicta* on the point, and laid down the rule that an attornment clause in a mortgage was merely an additional security for the mortgagee, as much for the payment of principal as for the payment of interest and that a mortgagee was not obliged to avail himself of this clause, and there was no pretence for saying that because the mortgage deed contained an attornment clause, under which possession had not been taken, the mortgagee was thereby fixed with all the liabilities of mortgagee in possession. In *Noyes* v. *Pollock*[4], the position was examined and it was held that,

> " If the mortgagee is in receipt of the rents and profits the account is taken against him as if he were in possession and he is answerable not only for what the tenants pay, but for not letting the property if he could have done so, and for not getting the full rents from the tenants if they could have paid them ; and he is looked upon as if he had taken upon himself the control and management of the estate as between those in actual occupation and the mortgagor so as to put an end to any right which the mortgagor has of dealing with the estate in the way of management, including letting and making allowances to tenants, and getting the best rent from them he can.
>
> In order to hold that a mortgagee not in actual possession is in receipt of the rents and profits in my opinion, it ought to be shown not only that he gets the amount of the rents paid by the tenants, even although he gets their cheques or their cash, but that he receives it in such a way that it can be properly said that he has taken upon himself to intercept the power of the mortgagor to manage his estate, and has himself so managed and received the rents as part of the management of the estate."

The case of *Green* v. *Marsh*[5] was cited for the appellant as a case in which the Court of appeal laid down the contrary proposition. After referring to the decision in Re *Stockton Iron Furnace Co.*[2], which was held inapplicable, the Court made the following observations :

> " The attornment clause was not such a taking possession by the mortgagee as was contemplated by the proviso, though no doubt it would render him liable to account at the suit of a subsequent mortgagee for all the rent agreed to be paid by the mortgagor which might be unreceived owing to the mortgagee's wilful default. But this attornment clause, not being registered, was void."

This statement of the law is plainly an *obiter dictum.*

We are not satisfied that there are good grounds for holding that the decision in *Madhwa Sidhanta Onnahini Nidhi, Ltd.* v. *Venkataramanjulu Naidu*[6] has stated the law erroneously or that it is inconsistent with later Privy Council cases. In this view it is unnecessary to consider the question whether section 76 of the Transfer of Property Act regulates the rights and obligations as between the mortgagor and the mortgagee only and we are not therefore called upon to express an opinion on this question. In the view we have taken on the first point, the appeal fails and must be dismissed with costs.

A claim for interest has been made. But there is no evidence on the record to show that the Fund after being appraised of the rights of the appellant withheld the money. That being so, no interest can be allowed for the period before the suit, but only from the date of the plaint at six per cent. per annum. The decree of the lower Court will be modified to this extent.

K.S. ——— *Appeal dismissed.*

---

1. (1883) 22 Ch.D. 478.
2. (1878) 10 Ch.D. 335.
3. (1881) 18 Ch.D. 127.
4. (1884) 32 Ch.D. 53.
5. (1892) 2 Q.B. 330.
6. (1903) I.L.R. 26 Mad. 662 (F.B.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNASWAMI AYYANGAR AND MR. JUSTICE KUNHI RAMAN.

Govindarajam Pillai and another .. *Appellants** (*Respts. 6 and 7, Defts. 6 and 7*)

v.

Alagappa Chettiar by power agent Veeraraghava Ayyangar and others .. *Respondents* (*Petr. and Respts. 1 to 5, Plff. and Defts. 1 to 5*).

Mortgage—Mortgagor and mortgagee—Sale by mortgagor of some items, vendee undertaking to discharge mortgage—Sale of other items later to another person—Vendee failing to pay—Suit on mortgage—Decree for sale first of properties conveyed to first vendee—Execution petition—Items conveyed to first vendee brought to sale for non-payment of revenue during pendency—Mortgagee decree-holder purchasing same for low value—Execution petition not pressed—Fresh application for recovery of balance of decretal amount from all the other items—Revenue sale whether can be avoided—Civil Procedure Code (V of 1908), Order 34, rule 14 (1).

A mortgagor sold certain items of the mortgaged properties, the vendee undertaking to discharge the mortgage. Later on he sold the remaining items to another person. The first vendee having failed to pay the mortgage amount, the mortgagee brought a suit on the mortgage and obtained a decree for the sale of the mortgaged properties. The decree directed the items conveyed to the first vendee to be sold first for the satisfaction of the decree and then the other items. Accordingly the mortgagee decree-holder filed an execution application for sale of the items conveyed to the first vendee. During the pendency of the execution petition, however, those properties, except for one item, were brought to sale for non-payment of arrears of revenue and the mortgagee purchased the same for a low value. Subsequently the decree-holder allowed the execution petition to lapse for non-payment of batta and it was then dismissed. Later on the decree-holder filed a fresh execution petition for recovery of the balance of the decretal amount due to him by sale of the remaining item as well as of the items conveyed by the mortgagor to the second vendee. The latter contended that the decree-holder's purchase at the revenue sale amounted to fraud and that the sale in his favour should be ignored and the transaction treated as one by which he had paid the government revenue and could only claim credit for the amount so paid.

Held, that the sale in favour of the decree-holder could not be avoided as the rule of prohibition contained in Order 34, rule 14 (1), Civil Procedure Code, was not applicable to the case, and that there was no other wider rule of equity or good conscience forbidding the mortgagee from purchasing the mortgaged property except through the medium of a sale in execution of the mortgage decree.

Limits of the mortgagee's power of purchase considered with reference to the law prevailing before the Civil Procedure Code of 1908, and the law in England.

Shaw v. *Bunny*, (1864) 33 Beav. 494 : 55 E.R. 460; *S. M. Kamini Debi* v. *Ramlochan Sircar*, (1870) 5 Beng.L.R. 450 and *Deo Nandan Prasad* v. *Janki Singh*, (1916) 32 M.L.J. 206 : L.R. 44 I.A. 30 : I.L.R. 44 Cal. 573 (P.C.), considered.

Appeal against the order of the Court of the Subordinate Judge of Cuddalore, dated 5th December, 1940 and made in E. P. R. No. 24 of 1940 in O. S. No. 6 of 1942.

S. Panchapagesa Sastri and *K. Venkataramani* for Appellants.

S. Jagadisa Aiyar for Respondents.

The Judgment of the Court was delivered by

Krishnaswami Ayyangar, J.—This appeal arises out of an order passed by the Subordinate Judge of Cuddalore, in an execution petition filed by the first respondent for the execution of a mortgage decree. The second respondent was the first defendant in O. S. No. 6 of 1932 in which the mortgage decree was passed. The mortgage on which the suit was instituted was one executed by him on 27th June, 1916, on behalf of himself and his two sons, respondents 3 and 4 (defendants 2 and 3). The fifth respondent (fourth defendant) was born after the execution of the mortgage. For the purpose of discharging the mortgage, the mortgagor sold part of the mortgaged properties, *viz.*, those in Schedule B to the sixth respondent (fifth defendant) who undertook to pay off the mortgagee out of the consideration amount. Having thus made due provision for the discharge of the mortgage, the mortgagor proceeded to sell other portions of the mortgaged property to the appellants (defendants 6 and 7) between the years 1927 and 1929. The sixth respondent failed to perform his obligation by paying the mortgage money due to the first respondent, with the result that the latter had to institute a suit on his mortgage. It is the decree obtained

*A. A. O. No. 80 of 1941. 28th July, 1942.

in this suit that is now under execution. Due obviously to the default on the part of the sixth respondent in the payment of the mortgage money, the decree contained a direction that the properties in Schedule B purchased by him as aforesaid should first be sold for the satisfaction of the decree and then, if necessary, those in Schedule C purchased by the appellants.

The execution petition in which the order under appeal has been made, is the fourth of its kind. The first was E. P. No. 105 of 1935 filed on 22nd April, 1935, for the sale of the properties in Schedule B referred to above. These properties were actually brought to sale on 15th March, 1936, but as there were no bidders the proceeding became infructuous, and was dismissed. The second attempt was made by E. P. No. 116 of 1936 filed on 16th August, 1936. The decree-holder again prayed for sale of properties in Schedule B in the first instance, but if the proceeds should be found insufficient, then for sale of the properties of the appellants in Schedule C. There were several orders of return made on this execution petition. The last one was on 1st October, 1936, with a requisition to be complied with within a week. The importance of this date will be apparent from the fact that on this identical date the decree-holder purchased all the properties in Schedule B except one item, namely, 51, at a revenue auction held by Government for the realisation of arrears of revenue. This purchase notwithstanding, the decree-holder (first respondent) continued the execution proceeding till 22nd March, 1937, when he allowed the petition to lapse by non-payment of batta and it was thereupon dismissed. The continuance of the execution petition even after the decree-holder had purchased the property, must have been due to a deliberate intention, on his part to keep the Court, the appellants and the other respondents in the dark as to what had happened—conduct which was undoubtedly reprehensible. The property was knocked down for the paltry sum of Rs. 430, and the sale was, as is the case with all revenue sales, free of all encumbrances. The properties were worth considerably more. According to the appellants they were worth Rs. 17,000 or thereabouts,—an estimate which cannot be far wrong in view of the extent of the property sold. The balance of the decretal amount due to the first respondent was roughly about Rs. 8,500. The third execution petition was filed on 13th October, 1939. It was returned and it was only re-presented along with the present execution petition.

In this execution petition (E. P. No. 24 of 1940) the decree-holder is seeking to proceed against the one item of property in Schedule B still remaining unsold and also against the properties of the appellants in Schedule C. Even in this execution petition, filed as late as 4th January, 1940, the decree-holder has not chosen to disclose the fact that he had himself become the purchaser of the property ; he merely mentioned that the B Schedule properties had been sold away in a revenue auction. There can be no doubt that the decree-holder has cleverly managed to obtain substantial properties almost for a song and the extent of his profit is the measure of the loss likely to be sustained by the appellants if their properties are held liable for the decree.

The appellants raised the contention in the Court below that the decree-holder's purchase was the result of fraud and collusion. But of this, there is no evidence on the record. Mr. Panchapagesa Sastri, the learned advocate for the appellants who has argued the case with great ability and learning, contends that though there may be no actual proof of fraud, the circumstances of the case are of such a character that fraud must necessarily be imputed to the decree-holder. The loss of the appellants, it was argued, has been the direct result of the unlawful gain made by the first respondent, and that he secured it by resort to devious methods with the definite object of getting round the restrictions placed on him by the decree. It is true that it was not open to him under the terms of the decree to have the C Schedule properties sold in execution, until he had proceeded against the properties in Schedule B. It may also be that he wanted to evade the restriction by purchasing at the revenue sale. But the question still remains whether the sale can be ignored and the transaction merely treated as one by which he paid

the Government revenue and can only claim credit for that amount. For reasons which will be explained presently, an affirmative answer to the question does not appear to be warranted. For reprehensible as his conduct might have been from a strictly moral standpoint, in no sense can the first respondent be held to have owed a legal duty to the appellants which stood in the way of his acquiring the property for himself in the way he did. But in considering this question we must rule out fraud altogether as there is no evidence direct or indirect to prove it.

The only limitations which fetter the power of a mortgagee to purchase the mortgaged property are those contained in (1) Order 34, rule 14 of the Code of Civil Procedure corresponding to section 99 of the Transfer of Property Act, 1882, and (2) section 90 of the Indian Trusts Act, 1882. The former statutory provision aims at affording to the mortgagor a measure of protection against the mortgaged property being sold at a disadvantage, while the latter is much wider in scope preventing, as it does, persons standing in a special relationship to certain others, from taking advantage of their position to secure a benefit to themselves in derogation of the rights of those others.

Section 99 of the Transfer of Property Act since repealed and replaced by Order 34, rule 14, precluded the mortgagee from bringing the mortgaged property to sale in execution of a money decree otherwise than by instituting a mortgage suit, irrespective of the question whether the claim arose out of the mortgage or not. Order 34, rule 14 is however narrower in its scope as it confines the prohibition to cases where a mortgagee obtains a personal decree on the mortgage debt and then seeks to execute it by attachment and sale without bringing a regular mortgage suit under rules 4 and 5. The appellants' advocate concedes that he cannot bring himself within the language of the rule, but argues that there is some wider rule of equity, some rule of good conscience, which prevents a mortgagee purchasing the mortgaged property except through the medium of a sale in execution of a decree on the mortgage. The rule of English law on the point may be taken to be that laid down by Kindersely, V.C., in *Falkner* v. *The Equitable Reversionary Interest Society*[1] and extracted in *S. M. Kamini Devi* v. *Ramlochan Sircar*[2]. The rule is thus stated :

> " A mortgagee has his rights ; he has a beneficial interest, and that interest is the realising of his security ; in other words, getting paid his mortgage money, principal, interest and any costs he may incur—that is his right ; but this Court will not allow him to exercise that right, without a due consideration of the interest of the mortgagor, and undoubtedly the interest of the mortgagor to which, in my opinion, the mortgagee is bound to attend, requires that the sale shall take place as beneficially to the mortgagor, as if the mortgagor were himself the party."

But these observations were made with reference to the limitations which govern a sale by a mortgagee when he sells under a power of sale contained in the deed itself. The decision of Lord Justice Knight Bruce on the identical subject in *Shaw* v. *Bunny*[3], if carefully read, leaves no room for doubt that the principle in question is the same as that now embodied in section 90 of the Indian Trusts Act. In *S. M. Kamini Devi* v. *Ramlochan Sircar*,[4] Macpherson, J., declined to rule that an equity of redemption can never be seized and sold by the mortgagee, but only decided that he cannot properly in execution of a simple money decree for a sum of money, the repayment of which is secured by a mortgage, attach and sell the mortgagor's equity of redemption in the property mortgaged, and that a mortgagee who attaches and sells his mortgagor's equity of redemption, and purchases it (directly or indirectly) himself, without having obtained leave of the Court, is a trustee for the mortgagor and cannot acquire an irredeemable title against him. After referring to *Shaw* v. *Bunny*[3] and stating that a second mortgagee can obtain an irredeemable title by purchasing the mortgaged property at a sale by the first mortgagee selling under a power of sale, he proceeded to explain the legal position thus :

> " But the case of a second mortgagee buying from a first mortgagee who sells under a power is quite different from the present case. A second mortgagee has no connection with the first mortgagee, and when he purchases, is a stranger, so far as that mortgage is concerned. But in the present case, the mortgagee purchased at a sale brought about by himself, in order to realise the debt for

1. (1858) 28 L.J. Ch. 137.
2. (1870) 5 Beng.L.R. 460 (footnote case).
3. (1864) 33 Beav. 494 : 55 E.R. 460.
4. (1870) 5 Beng.L.R. 450.

which the property was under mortgage to him. It is one thing to buy at a sale held by a third party in satisfaction of a prior mortgage; it is another thing to buy at a sale held at the suit of the purchaser himself, in execution of a decree which he has obtained for money as security for which the property sold is under mortgage to him."

It is thus clear that *S. M. Kamini Debi* v. *Ramalochan Sircar*[1] affords no support to the argument of the appellant's advocate. On the contrary it shows the limits of the doctrine, and unequivocally indicates the extent of the disability. When the English rule was sought to be given statutory recognition in this country when the Transfer of Property Act, 1882, came to be enacted, it was made more extensive in its operation, probably with the idea of suiting it to the conditions prevailing here. The narrower rule now enacted by Order 34, rule 14 of the Code of Civil Procedure, by which alone this case falls to be decided, appears to be more in consonance with the English rule, and not only does not support the appellants, but shows clearly enough the limitation subject to which the doctrine is now to be understood and applied. The Courts in this country are not entitled to travel beyond the express terms of the statute in search of some general principle outside the enactment and inconsistent with its language.

Neither can the appellants derive any assistance from section 90 of the Indian Trusts Act. Though there is no express reference to it, it is clear that the relationships enumerated in the section are all of them of such a character that they may give rise to a conflict of duty and interest in certain circumstances; in other words, a fiduciary relationship is implicit in the section, and is the basic ground on which relief is to be afforded, provided of course the conditions laid down are satisfied. Before the benefit of the section can be demanded it must be shown that (1) the party against whom relief is sought availed himself of his position, (2) he gained an advantage by so doing, and (3) the advantage was gained in derogation of the rights of the person interested in the property. It is perfectly plain to our mind that the first respondent was in no sense in a fiduciary position in so far as the appellants are concerned. It is equally plain that, in purchasing the property at the revenue sale, he cannot be deemed to have availed himself of any special position he held. If, as we hold, these two conditions are not satisfied, the fact that he has gained an advantage to the prejudice of the appellants cannot afford them any ground of relief. When the Government brought the property to sale, any stranger could have purchased it and obtained a clear title incapable of being assailed by anybody. We cannot see why a mortgagee should be held to be in a worse position, so long as the sale was not due to any wrongful conduct on his part.

Reference may now be made to two decisions on which the appellants' learned advocate strongly relied. *Deo Nandan Prasad* v. *Janki Singh*[2] is, in our opinion, a decision which merely furnishes an illustration of the principle embodied in section 90 of the Trusts Act in so far as co-owners are concerned, though there is no express reference to the section to be found in the judgment. There it was found that the mortgagee from one of several co-sharers, intentionally allowed the revenue payable on the mortgaged interest, to fall into arrears with a view to the property being put up for sale and bought on his behalf, though the other co-sharers had duly paid their quota. The default in the payment of the revenue, and the purchase at the revenue sale were made by the agent of the mortgagee who was himself only a minor. Their Lordships observed as follows:

"If this be the true view, as their Lordships hold, then, however free from personal blame the minor may have been, he cannot profit by his agents' deliberate default committed in breach of the terms of the mortgage. As against his mortgagor, therefore, the mortgagee cannot be allowed to hold for himself the advantage gained by the default for which his agents were responsible. Nor, in their Lordships' opinion, can he be permitted to hold for himself this advantage to the prejudice of the co-owners. For this purpose the mortgagor and mortgagee may be identified; they together represented the three annas share, and theirs was the obligation to pay their quota of the revenue. Equally in relation to the co-owners was the default designed with a view to a subsequent sale and to a purchase on the minor's behalf, and the advantage gained by this scheme must, in like manner, be held for the benefit of the co-owners, who are not shown to have been aware of the default or sale, or to have disentitled themselves to this equitable relief. They had contributed their proper quota to this

1. (1870) 5 Beng.L.R. 450.
2. (1916) 32 M.L.J. 206: L.R. 44 I.A. 30: I.L.R. 44 Cal. 573 (P.C.).

September instalment, and it cannot be supposed that had they known of the default or the peril to their interests they would have allowed a valuable property, worth, it is said, not less than Rs. 8,000, to be sold away for the failure to pay two rupees ten annas."

That the ground of decision was the fiduciary position subsisting between co-sharers is made plain by a later passage in the judgment wherein their Lordships dissented from the view laid down in *Doorga Singh* v. *Sheo Pershad Singh*[1] that there was no such relationship, and observed that that decision failed to pay due regard to the relative position of co-sharers in respect of the payment of revenue and to the need of demanding from each such measure of candid dealing and good faith as would ensure that a sharer would not be tempted to make a deliberate default with a view to ousting his co-sharers and appropriating to himself the common property. The same principle was applied in *Akshayakumarnath Talukdar* v. *Ahmedali Howladar*[2] to a case where the purchaser co-sharer was not himself a defaulter in the payment of revenue, but acting in collusion with another co-sharer had schemed to procure a default, and then purchased the property. Rankin, C.J., obviously had in mind the principle of section 90 when he said,

"If the co-sharer, although not liable to pay the revenue on this particular joint account, goes and arranges with another and procures with him that there shall be a default in order that the co-sharer may ultimately purchase, that seems to be conduct inconsistent with any relation of mutual confidence between co-sharers and, if so, equity can give a remedy."

But he added the significant rider which is of great importance to the present case,

"Of course, if defendant No. 1 had not intentionally procured the default which resulted in the revenue sale, he would have been entitled to purchase the plaintiffs' estate for himself. I cast no doubt upon that at all. But that is not this case."

There is no ground in the present case to consider that the first respondent was under a duty to pay the revenue due on the property in schedule B, nor did he scheme to bring about a default in its payment. His position is not different from that of a second mortgagee who purchases the mortgaged property at a sale by the first mortgagee in exercise of a power of sale. The Government in respect of the revenue payable on the land is in the position of a first mortgagee, and has a first charge given to it under section 2 of the Madras Revenue Recovery Act, and a sale for arrears of revenue conveys the property to the purchaser free of all encumbrances by force of section 42. It is not denied that if a mortgagee purchases at a sale in execution of a decree, whether mortgage decree or money decree, obtained by a third person, he gets an irredeemable title and the equity of redemption is extinguished. If that is so, it is difficult to see on what legal ground the position of the first respondent is to be held to be different.

We are clearly of opinion that to accede to the contentions of the appellants is to depart from the letter and spirit of the two statutory provisions referred to above, and engraft on them an addition for which we can find no legal warrant. The law that we are charged to administer does not, subject to certain well-known exceptions, prevent the wary and the diligent from taking advantage of their less fortunate fellowmen, if the latter do not exhibit that degree of alertness which is necessary for the protection of their interests.

The appeal fails and must be dismissed. We can only mark our sense of disapprobation of the first respondent's conduct by depriving him of his costs here and in the Court below.

B.V.V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Varadaraja Padayachi .. *Accused.**

Criminal Procedure Code (V of 1898), section 562—Person over 21 years of age convicted under section 454, Indian Penal Code—Not to be released under section 562, Criminal Procedure Code.

If section 562 of the Criminal Procedure Code is to be applied to persons over 21 years of age, it must be only in relation to offences that are punishable with sentences not exceeding

---

1. (1889) I.L.R. 16 Cal. 194.
2. (1931) I.L.R. 59 Cal. 180.

*Cr. R. C. No. 227 of 1942. (C. R. No. 13 of 1942.) 17th July, 1942.

seven years. An offence punishable under section 454, Indian Penal Code, being punishable with ten years' rigorous imprisonment an accused convicted of such an offence ought not to be released under section 562 of the Criminal Procedure Code.

Case referred for the orders of the High Court under section 438, Criminal Procedure Code, by the Sessions Judge of East Tanjore Division at Negapatam, in his letter No. 1405 of 14th March, 1942.

A. S. Sivakaminathan for Accused.

K. Venkataraghavachari for Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court delivered the following

JUDGMENT.—The accused was convicted by the Sub-Divisional Magistrate, Mayavaram, of an offence punishable under sections 454 and 380, Indian Penal Code and was released under section 562, Criminal Procedure Code, upon his executing a bond. On appeal, the Sessions Judge of East Tanjore affirmed the conviction but referred the case to this Court as to the sentence, because the order passed by the Sub-Divisional Magistrate was an illegal one. If section 562 is to be applied to persons over 21 years of age, it must be only in relation to offences that are punishable with sentences not exceeding seven years, whereas an offence punishable under section 454, Indian Penal Code, is punishable with ten years' rigorous imprisonment.

I do not think this revision case should be regarded as one for enhancement of the sentence, entitling the accused to agitate findings of fact; but even if it were, I should have no hesitation in agreeing with the findings of the Courts below, for the accused was found in possession of stolen property, and he admitted to the Village Magistrate that he had stolen that property from the house of the complainant. He must therefore have been guilty of house-breaking as well as of theft in a building.

As section 454, Indian Penal Code, requires that a sentence of imprisonment should be given, I accept the reference, set aside the order under section 562 of the Criminal Procedure Code, and sentence the accused to one month's rigorous imprisonment.

K.S. ——— *Reference accepted.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Karathammathintakath Kunhamad .. *Appellant** (*Accused-Prisoner*).

Criminal Procedure Code (V of 1898), sections 476-B and 556—Complaint under section 476-B—Appeal to District Judge—Dismissal—Case against accused before same Judge—Court whether precluded from trying case.

In a suit for rent against him the accused produced a receipt for a portion of the dues. The District Munsiff who tried the suit came to the conclusion that the receipt was a forgery. After holding an enquiry he came to the conclusion that a complaint should be laid against the accused for forgery and other kindred offences. His order lodging a complaint was carried in appeal under section 476-B, Criminal Procedure Code, to the District Judge who came to the conclusion that the District Munsiff was justified in filing a complaint and dismissed the appeal. Subsequently the case against the accused came up before the same District Judge as Sessions Judge and an objection was taken that he was precluded by section 556, Criminal Procedure Code, from trying the case.

Held, that the District Judge in considering the appeal on the former occasion could not be said to be a party to the proceedings and that he was not precluded from trying the case against the accused.

Ponnuswami Pillai, Re, (1940) 52 L.W. 345; *Queen-Empress* v. *Chenchi Reddi*, (1900) I.L.R. 24 Mad. 238; *Sudhama Upadhya* v. *Queen-Empress*, (1895) I.L.R. 23 Cal. 328; *Emperor* v. *Bisheshar Bhattacharya*, (1910) I.L.R. 32 All. 635 and *Mudkaya Andanaya Hiremath*, In re, A.I.R. 1927 Bom. 35, considered.

Appeal against the order of the Court of Session of the North Malabar Division, dated 9th April, 1941 and passed in C. C. No. 4 of 1941.

C. K. Viswanatha Aiyar for Appellant.

A. S. Sivakaminathan for the Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court delivered the following

JUDGMENT.—The appellant has been convicted by the Sessions Judge of North Malabar of offences punishable under sections 193, 467 read with sections 109 and

*Crl. App. No. 330 of 1941. 18th September 1941.

471 read with section 467, Indian Penal Code and has been sentenced to one year's rigorous imprisonment on each count, the sentences to run concurrently.

P. W. 3 filed two suits for arrears of rent against the accused for the Malayalam year 1114 and for a part of the rent due for the year 1113. The accused then produced Ex. C, which purports to be a receipt for the balance of rent due for the year 1113, and during the course of the trial he paid the rent due for the year 1114. The District Munsiff who tried the suits came to the conclusion that Ex. C was a forgery. He therefore issued notice to the accused and inquired into the matter; and he came to the conclusion for reasons expressed by him that a complaint ought to be laid against the accused for forgery and other kindred offences. He therefore laid a complaint. His order was carried in appeal under section 476-B, Criminal Procedure Code, to the District Judge, who came to the conclusion that the learned District Munsiff was justified in filing a complaint and dismissed the appeal. Now the same matter has come before the same Judge as the Sessions Judge of North Malabar; and a preliminary objection has been taken to the legality of the proceedings in the Sessions Court on the ground that the Sessions Judge was precluded by section 556, Criminal Procedure Code, from trying this case.

If the District Judge had himself filed this complaint, he would have been directly hit by section 556 of the Criminal Procedure Code and he would have had no jurisdiction to try this case. The questions of prejudice to and the effect of the consent of the accused would not have arisen at all, because he would have had no jurisdiction to try the case. The same result would have followed if the District Munsiff had declined to lay a complaint and the District Judge, by virtue of the authority given to him by section 476-B, had ordered the District Munsiff to lay the complaint. The maxim *qui facit per alium facit per se* would then apply, and even though the District Munsiff had laid the complaint, he would have done so as the agent of the District Judge; and it could then have been said that the District Judge was a party in the case. A very different question arises, however, when the District Judge merely considers, on appeal from the order of the District Munsiff directing the filing of a complaint, whether a *prima facie* case has been made out and then dismisses the appeal. There, the Judge cannot be said to have been a party to the proceedings; and so the only question that would arise in such a case would be whether he could be said to be personally interested. It is difficult to see how he could be interested in the result. It was not he who laid the complaint. In a purely judicial capacity he had to consider whether the District Munsiff was right in finding that a *prima facie* case had been made out. A Court has often to consider twice the same set of facts, and it does not necessarily follow that because it has passed an order on the matter at a prior stage, it is precluded from considering the matter at a later stage. In a revision application, for example, a Judge of the High Court may find that there is no cause for interference with the course of a trial; but that would not preclude him from hearing an appeal if the case subsequently ended in a conviction and an appeal was preferred. In the same way, a Judge often considers the facts of a criminal case in a bail application—either in particular proceedings which are before him or in the proceedings of Subordinate Courts which ultimately end in a conviction and come before him in appeal. I find it difficult to believe that the Sessions Judge was in any way biased as a result of his previous deliberations; still less can it be said that he was interested.

A number of cases have been referred to by the learned counsel for the appellant and by the learned Public Prosecutor; but not one of those discussed resembles the present case at all closely. Lakshmana Rao, J., in *Ponnuswami Pillai*, Re[1], set aside an appellate order because the Joint Magistrate who heard the appeal had laid the complaint; but no facts are set out in that judgment and we do not know what were the considerations which led the learned Judge to pass the order. If this matter had come before me in a transfer application, then I would undoubtedly have ordered a transfer; because the fact that the Judge who heard the appeal

---

1. (1940) 52 L.W. 345.

from the order that a complaint should be made was to try the case itself, might cause a reasonable apprehension in the mind of the accused that he might not secure a fair trial. Such a case arose in *Kottamidi Ranga Reddi* v. *Emperor*[1], when Pandrang Row, J., ordered the case to be transferred to some other Sessions Judge. But the very fact that the accused here did not file an application for transfer in this Court, did not ask the Sessions Judge to apply to this Court to have the matter transferred, and did not even object to the trial by this Judge, shows that the accused had in fact no apprehension that he would not receive justice at the hands of Mr. Sivaramakrishnan. Most of the cases quoted on behalf of the learned Public Prosecutor do not help us very much, because they were cases in which it was quite obvious that the Magistrates were not interested. They were responsible for the general administration of subjects connected with the matter under inquiry; but they had nothing to do with the inquiries in those particular cases. In *Queen-Empress* v. *Chenchi Reddi*[2], however, two learned Judges of this Court held that a Deputy Magistrate who, after considering certain allegations against a person, ordered the Tahsildar to prosecute him on such charges as could be proved in a Criminal Court, was not precluded from hearing an appeal against the conviction, because he was not personally interested in the matter within the meaning of section 556 of the Criminal Procedure Code. In *Sudhama Upadhya* v. *Queen-Empress*[3], the Magistrate had initiated some of the police inquiries and played an important part in the investigation, intervening in it at various stages. It was held that he was an interested party and therefore had no jurisdiction to try the case. In *Emperor* v. *Bisheshar Bhattacharya*[4], the President of the Octroi Sub-Committee of a Municipal Board, expressed an opinion on the material before him and ordered his Secretary to prosecute. He afterwards tried that case and it was held that as he had already considered the facts and had ordered his Secretary to make a complaint, he was personally interested. In *Mudkaya Andanaya Hiremath*, In re,[5] the Sessions Judge, in disposing of a Sessions case, came to the conclusion that certain offences had been committed by some of the prosecution witnesses and he therefore ordered their prosecution. The Magistrate who tried the accused for the offences which were the subject of the complaint of the Sessions Judge discharged two of the accused, and the same Sessions Judge ordered that these two accused should be committed to the Sessions. It was held that he was an interested party and therefore had no jurisdiction to order the discharged persons to be committed to the Sessions. None of these decisions goes as far as to say that a Magistrate or Judge who merely expressed an opinion that there was no sufficient reason to stop a prosecution, is an interested person. There is no more ground for thinking Mr. Sivaramakrishnan interested in this case than the Deputy Magistrate in the case dealt with in *Queen-Empress* v. *Chenchi Reddi*[2]. There is however one case which, in general outline, is something like the present case; but special circumstances existed in that case. The Sessions Judge, as District Judge, heard the appeal from the order of the District Munsiff sanctioning a complaint, and used very strong language in dismissing the appeal. He said that the mortgage bond in question was "replete with some of the clearest forgeries that were ever perpetrated" and was "obviously made dishonestly and fraudulently." The learned Judges who dealt with this matter in revision did not say that the Sessions Judge had no jurisdiction; but they thought it proper, for reasons not expressed, to direct the appeal to be re-heard by another Judge. In the present case Mr. Sivaramakrishnan merely quoted a part of the District Munsiff's judgment and said that there was sufficient material to justify the District Munsiff in laying a complaint.

Another technical objection raised by the learned counsel for the accused is that the Sessions Judge has admitted documents wholesale from the civil case which are not admissible; in particular, he complains of the free use of the judgment of the District Munsiff in the civil proceedings. Judgments are admissible to show the parties to the proceedings, the points raised, and the decisions thereon. The

1. (1934) M.W.N. 862.
2. (1900) I.L.R. 24 Mad. 238.
3. (1895) I.L.R. 23 Cal. 328.
4. (1910) I.L.R. 32 All. 635.
5. A.I.R. 1927 Bom. 35.

reasons given are of course irrelevant; but the learned Sessions Judge certainly did not consider himself bound—nor could he have been influenced—by any remarks in the judgments in the civil case. As the arguments in the section 476 proceedings and in the civil suit were necessarily much the same as in the criminal trial, one would expect a similarity in the reasons given in the Criminal Court and in the Civil Court, but that does not mean that the Sessions Judge was influenced by the decisions in the Civil Court. Still less does it mean that the Judge considered that he was in any way bound by them.

[His Lordship then considered the facts of the case and held that the charges against the accused were established beyond all reasonable doubt; and observed:]

* * * * * *

The sentences are not excessive. The convictions and sentences are therefore affirmed and the appeal dismissed.

B.V.V. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Visalakshi Ammal .. *Petitioner** (*Petitioner*)

v.

PL. SP. NK. Nagappa Chettiar .. *Respondent* (*Ctr.-Petitioner*).

Criminal Procedure Code (V of 1898), section 488—Maintenance claim by a dancing girl—Marriage with respondent if legal—Claim raised in civil suit also—Question not to be gone into in revision—Maintenance of son in the circumstances.

Where the petitioner, a dancing girl, who had gone through some form of marriage with the respondent, claimed maintenance for herself and her son born of the union and the Magistrate dismissed the petition so far as she was concerned on the ground she had not proved that she had remained chaste subsequent to her separation from the respondent and ordered an allowance of Rs. 25 as maintenance for her son,

Held, (1) that though it was not right for the Magistrate to require her to prove her chastity still owing to the pendency of a civil suit wherein the question of the validity of the marriage had been raised the order rejecting maintenance to the petitioner need not be interfered with in revision.

(2) As regards the son's maintenance no doubt the allowance would be inadequate if he was born out of a proper marriage but in case the marriage was not legal the allowance would be liberal.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the order, dated 18th February, 1942 in M. C. No. 55 of 1941 on the file of the Court of the Sub-Divisional Magistrate, Devakottah.

S. S. Rajagopalan and *T. K. Rajagopalan* for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

G. N. Chary for Respondent.

The Court made the following

ORDER.—The petitioner is a member of the dancing girl community and the respondent a Nattukottai Chetti. They apparently went through some form of marriage, and as the respondent afterwards abandoned and neglected the petitioner, she was obliged to file a petition under section 488 of the Code of Criminal Procedure before the Divisional Magistrate of Devakottah for maintenance for herself and for the son of the union. The Magistrate dismissed the application as far as the petitioner was concerned on the ground that though she had been married to the respondent she had not proved that she had remained chaste from the date when the respondent had abandoned her. He found that the son of the petitioner was also the son of the respondent and awarded him a maintenance of Rs. 25 a month. The petitioner has filed this revision petition on the ground that the Magistrate dismissed the application as regards herself for very improper reasons and that in view of the fact that the respondent was a very wealthy man, the maintenance of Rs. 25 for the son was inadequate.

*Crl. R. C. No. 356 of 1942. 21st August, 1942.
(Crl. R. P. No. 346 of 1942).

Although the petitioner went through some form of marriage with the respondent, I am very doubtful whether a Nattukottai Chetti can be legally married to a girl of the dancing girl community. This question has been raised in the civil suit now pending which has been filed by the respondent (O. S. No. 33 of 1942); and so I do not think that I should interfere in revision with the dismissal of her claim, even though it was wrong for the Magistrate to consider that she was bound to prove that she had been chaste. The adjudication of her rights will have to await the result of the civil litigation. The respondent's learned advocate has said that the respondent is as anxious as the petitioner to have the litigation disposed of speedily.

If the petitioner and the respondent were legally married and the respondent is as wealthy as the petitioner says he is, then I think that Rs. 25 would be somewhat inadequate; but if they were not legally married, then Rs. 25 is a very liberal allowance. In any event, the boy is being brought up by his mother and it would be rather absurd if she adopted a standard of living for him which she could not adopt for herself. I do not think therefore that the rate of maintenance fixed necessitates any revision by this Court.

The petition is dismissed.

K.C. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUPPUSWAMI AIYAR.

M. Abdul Latiff .. *Petitioner.**

Penal Code (XLV of 1860), section 266—Using false measures—Gist of offence—Facts to be proved by prosecution.

The prosecution has to prove that the person in possession of a false measure knew it to be false and was in possession intending that the same may be fraudulently used. It is not sufficient that the capacity of the measures seized did not conform to the standard fixed by Government. If a dealer has a measure in his shop which has been tested by the Government and certified to be a proper measure there is no reason to presume that he could have known that it was not a correct measure or that at the time when the stamp was put on this measure it was not up to the prescribed standard. There is in law no duty cast on a shop-keeper to have the measures tested periodically and it cannot be presumed that the shop-keeper was using the measure fraudulently merely by the fact that he did not have his measures tested regularly and the measure is found to be short. There must be evidence that he was aware of the fact that the measures were smaller than the standard ones.

Petition under sections 435 and 439 of the Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the Joint Magistrate of Coonoor in C. C. No. 328 of 1942, dated 10th November, 1942.

Lobo for *Pais*, *Lobo* and *Alwares* for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—This is a petition to revise the conviction and sentence passed by the Joint Magistrate of Coonoor in C. C. No. 328 of 1942 for an offence punishable under section 266, Indian Penal Code. The sentence imposed was a fine of Rs. 50. The charge was framed against M. A. Abdul Latiff and Company of Coonoor market and was to the effect that the accused noted in column 2, namely, Abdul Latiff and Company was using false measures, namely, a brass half measure and another full iron measure seized by the Circle Inspector of Police from the shop on the 29th September, 1942, which were found to be false measures. Notice was issued to the company and one Mohamed Ibrahim appeared in person and pleaded not guilty. He it was that was also examined under section 342 of the Criminal Procedure Code. He was asked whether his shop was in possession of a brass measure and one full iron measure which were false measures. He replied that the measures were correct and that the measures in Court were seized from him.

In the judgment it is stated that M. Abdul Latiff was charged by the Coonoor Police with an offence under section 266, Indian Penal Code and sentenced to a

*Crl. R. C. No. 101 of 1943. (Crl. R. P. No. 86 of 1943). 16th April, 1943.

fine of Rs. 50. It is that Abdul Latiff that has filed this petition. His case is that he was only the senior partner of the firm of Abdul Latiff and Company, that he is generally a resident of Keeranur and that he was in Keeranur at the time of the alleged seizure of the measures. It is contended that the partner of a firm like the petitioner could not be convicted for an offence under section 266 unless it is proved that he was present in the shop and was fraudulently using these false measures knowing that they were false.

So far as he is concerned, there is no evidence to show that he knew the fact that they were false measures or that he had any fraudulent intent in having those measures. It is further stated that he ought not to have been convicted without specific notice being sent to him and without proving that he was the person that committed the crime.

I think it is unnecessary to go into this question, for even on the merits the conviction is not sustainable. The prosecution has to prove that the person in possession of a false measure knew it to be false and was in possession intending that the same may be fraudulently used. It is true that there is evidence that the two measures that were seized were false measures in the sense that the capacity of these two measures did not conform to the standard fixed by Government. But it has also to be proved that the person in possession knew them to be false. These two measures admittedly bear the stamp of the taluk office showing that they were checked and were found to be correct. If a dealer has a measure in his shop which has been tested by Government and certified to be a proper measure, there is no reason to presume that he could have known that it was not a correct measure or that at the time when the stamp was put on this measure it was not up to the prescribed standard. The learned Magistrate observes in paragraph 4 of his judgment:

> "There has therefore been no attempt on the part of the accused to have them checked since, though he should know that in the course of time and with wear and tear the measures would have tended to get smaller."

Evidently the learned Magistrate did not notice that this is not a case of a false weight but a false measure of capacity and on account of wear and tear such measures would tend to get bigger instead of becoming smaller. It has not been shown that there is in law any duty cast on the shop-keeper to have the measures tested periodically. The learned Magistrate observes that if he did not have his measures tested regularly and if the measures were found to be short, there is a presumption that he was using them fraudulently. Such a presumption cannot arise unless there is evidence to show that he was aware of the fact that the measures were smaller than the standard ones.

In these circumstances it could not be said that the prosecution has proved that the person in possession of these measures knew them to be false, especially when there is the stamp of the taluk office on them.

In the result, the conviction and sentence are set aside, and the fine, if already collected, will be refunded.

K.S. *Petition allowed.*

[SPECIAL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE MOCKETT AND MR. JUSTICE KRISHNASWAMI AYYANGAR.

In the matter of an Advocate, Tuticorin*.

Thayumanasundarathammal .. *Complainant.*

Legal practitioner—Bona fide *claim to lien on papers for his outstanding fees—No misconduct—Mother of minor employing advocate to act in her own suit as well as in a suit filed on behalf of minor—No obligation on the part of advocate to keep separate accounts.*

There can be no professional misconduct when an advocate puts forward a *bona fide* claim to a lien on the papers of his client in respect of his outstanding fees. As an advocate fulfils the role of a solicitor also it may be argued that he is entitled to the advantages of a solicitor. In a suitable case the decision in *Krishnamachariar* v. *The Official Assignee of Madras*, (1931) 62 M.L.J. 185 : I.L.R. 55 Mad. 455, that an advocate has no lien apart from an express agreement may have to be reconsidered.

---

*Ref. Case No. 4 of 1943. 23rd March, 1943.

In re *a Pleader*, (1942) 2 M.L.J. 196 : I.L.R. (1943) Mad. 30 (S.B.), referred to.

Where the mother of a minor employed an advocate to act for her in her own suit and in a suit filed by her as next friend of her minor son, there is no obligation under rule 27 (note 1) of the rules under the Legal Practitioners' Act on the part of the advocate to keep separate accounts. What the rules require is that he should keep accounts.

The Advocate-General (*Sir A. Krishnaswami Aiyar*) for the Crown.

B. Sitarama Rao for *R. Ramamurthi Aiyar* for Respondent.

Complainant not represented.

The Judgment of the Court was delivered by

The Chief Justice.—The respondent is an advocate of this Court. Seven charges of professional misconduct have been framed against him. They have been investigated by the District Judge of Tinnevelly, who has held that five of them have not been substantiated but that two of them have been proved. The report of the District Judge now comes up for consideration by this Court. We agree with the District Judge that the five charges which he has decided in favour of the respondent have not been proved, but we disagree with him with his findings on the other two charges. On these charges we consider that the respondent is also entitled to a decision in his favour.

The petition on which these proceedings were instituted was filed by Thayumanasundarathammal, the widow of one Sankara Gomathi Chettiar, a merchant of Tuticorin. Sankara Gomathi Chettiar died on the 28th July, 1927, when his wife was 23 years of age. By her he had three children, the eldest of whom was a boy named Muthiah. Sankara Gomathi Chettiar left certain properties, but according to the report he was, at the time of his death, in embarrassed circumstances. At all material times the respondent practised at Tuticorin and between the month of July, 1929, and the month of January, 1932, he appeared in suits on behalf of the minor. Muthiah's maternal grandfather, Kasinatha, appears to have instructed the respondent in matters which affected the minor.

The first charge is to the effect that while acting for the minor in two cases which are specified and representing him "generally" the respondent accepted a vakalat from one Joseph Fernando of Tuticorin to appear in proceedings to enforce the payment of a decree which had been obtained against the minor as representing his father's estate. It is perfectly clear that the respondent did not hold a general retainer on behalf of the minor, but had merely been engaged in certain cases. In each case he was given a separate vakalat. There was nothing to prevent him appearing on behalf of Joseph Fernando against the minor and this the District Judge has recognised. It may here be mentioned that included in the first charge is an additional charge of having misappropriated the sum of Rs. 2-8-0. There is no question of misappropriation here and it is very regrettable that this additional charge was framed.

The second charge is that in October, 1929, the respondent received three sums aggregating Rs. 600 from one Karuthiah A. Fernando for payment to the minor, and that the respondent "dishonestly or negligently" paid the money to Kasinatha, the maternal grandfather who had no authority to receive payment on behalf of the minor. The money was paid over to Kasinatha in order that he might take it to his daughter who was living in seclusion. His daughter, as the mother of the minor, was his lawful guardian. The District Judge has held that the respondent was not dishonest or negligent in doing this and we agree with him. The money was eventually paid over to Muthukumaraswami Pillai, the brother of the respondent, to whom Karuthiah was indebted. The evidence shows that the payment over to Muthukumaraswami Pillai was made with the consent of the minor's mother.

The third charge is divided into three parts. Charge III (*a*) is to the effect that the respondent in obtaining a consent decree in a suit in which the minor was concerned made a false statement and concealed a material fact from the Court. The suit was S. C. No. 129 of 1930 of the Court of the Subordinate Judge of Tuticorin. It was filed on behalf of the minor to recover from the firm of Aspinwall and Company Rs. 750 alleged to be due for fibre supplied to them by the minor's father. The defence was that there had in fact been an overpayment to

the extent of Rs. 95-15-0 in respect of the fibre delivered to the defendants. Sankara Gomathi Chettiar had dealt with Aspinwall and Company for many years and they did not wish to have litigation with his son. They were willing to pay the plaintiff the sum of Rs. 250 so long as it was treated as a bonus and was not mentioned in Court, but they wished to make it clear that they were not admitting any liability. The alleged untrue statement is this :

> " Now certain persons have examined the account books of both parties and the voucher produced by plaintiff relating to delivery of fibre. Plaintiff's father was responsible for short weight in respect of fibre supplied by him and it is learnt that there has been short weight. Therefore in the interests of the minor it is considered inadvisable to proceed with this case. Taking into consideration the longstanding dealings between the plaintiff and defendant and having regard to the plaintiff's condition the defendant agrees to forego the amount due to him and the costs of this suit."

This charge was framed as the result of observations of Stodart, J., in a judgment delivered by him on the 17th January, 1940, in disposing of two civil revision petitions and three second appeals, which were heard together. It is not necessary to state the circumstances in which those cases arose or to examine in detail what the learned Judge has said there: It is sufficient to say that there is no evidence of any false statement made by the respondent. The charge of concealment of a material fact is in connection with the payment by Aspinwall and Company to the plaintiff of Rs. 250. This was not mentioned to the Court because Aspinwall and Company expressly prohibited its disclosure. We consider that there was full justification for the respondent taking the course which he did in that case. He made no false statement.

In charge III (*b*) the respondent is alleged to have made in a written statement filed in O. S. No. 319 of 1933 of the District Munsif's Court of Tuticorin another false statement. In the written statement there was this averment :

> " The allegation that the defendant in S. C. No. 129 paid Rs. 300 into the hands of second defendant is false. It is true that the said suit was settled by defendant on payment of Rs. 300 but the payment was to the plaintiff's mother directly."

O. S. No. 319 of 1933 was instituted by the minor against the respondent and his brother Muthukumaraswami Pillai to recover what he alleged had been over-payments made to them by his maternal grandfather acting on his behalf. The sum of Rs. 300 mentioned in the written statement is a mistake for the Rs. 250 received from Aspinwall and Company in settlement of S. C. No. 129 of 1930. This, of course, was a mere slip. The statement which is said to be false is the statement that the money was paid to the minor's mother direct. It is true that it was not. It was paid by Aspinwall and Company to the respondent who immediately handed it over to Kasinatha to take to his daughter. Kasinatha, accompanied by the respondent's clerk, immediately took the money to his daughter and an hour and a half later they brought back the petition of compromise duly signed by her. All that can be said here is that the respondent's memory was faulty, but the matter is one of no moment. The money was received by the plaintiff's mother and received by her within a few minutes after it had been paid over by Aspinwall and Company.

The third part of the third charge is one of misappropriation. Here the respondent is accused of having misappropriated the Rs. 250 paid by Aspinwall and Company. This charge must be read with charge No. IV as that charge has been framed as an alternative charge to charge No. III (*c*). Charge No. IV reads as follows :

> " That you were privy to a scheme which enabled the next friend of the minor Muthiah Pillai to take away the money without the leave of the Court and without security as required by Order 32, rule 6, Civil Procedure Code."

In disposing of charges III (*a*) and III (*b*) we have said sufficient to indicate that there is no substance in either charge III (*c*) or charge IV. As in the case of charges III (*a*), (*b*) and (*c*), charge IV would not have been framed but for what Stodart, J., had said in his judgment of the 17th January, 1940. In dealing with the petition against the respondent the Court cannot go into the question whether the civil revision petitions and the second appeals which were dealt with in that judgment were rightly decided, but inasmuch as the learned Judge did make

observations which reflected on the respondent's integrity, and those reflections have been made the foundation of some of the charges under consideration it is proper that the Court should express its opinion on the evidence before it. The evidence which was before the learned Judge is the evidence before us to-day, and we find ourselves unable to agree with what the learned Judge has said with regard to the respondent. In saying what he did Stodart, J., was in effect disagreeing with what the trial Judge and the first appellate Judge had said. The findings of fact of the Subordinate Judge who heard the first appeal were conclusive. Stodart, J., refused to be bound by those findings, because he considered that the Courts below had been strongly influenced by the "wrong assumption" that the case of the plaintiff as set up at the trial was inconsistent with the case stated in the plaint. The District Munsiff and the Subordinate Judge dealt with the case on the evidence on the record. That evidence is the evidence here and as we have indicated we can see no justification for the reflections made by the learned Judge on the respondent. The fifth charge is that the respondent having been employed by Thayumanasundarathammal to act for her in her own suit and in a suit filed by her as the next friend of her minor son Muthiah, had omitted to keep separate accounts of moneys received and spent in the name of the mother and in the name of the minor as required by "rule 27 (Note 1) of the Rules under the Legal Practitioners' Act." There was no obligation on the part of the respondent to keep separate accounts. What the rules framed under the Legal Practitioners' Act require is that he should keep accounts and that is what he did. In his book of account he showed what he had received and spent on behalf of the mother and what he had received and spent on behalf of her son. The entries were made separately. The respondent did all that was required of him.

The charges which the District Judge considered have been proved are charges VI and VII. Charge VI reads as follows:

"That you filed fees certificate in the said O. S. Nos. 32, 248 and 249 of 1929 in contravention of the rule that the giving of a promissory note does not entitle a legal practitioner to certify that he has received his fee."

Rule 95 of the Civil Rules of Practice of this Court states that unless the Court otherwise orders, and except in the case of an advocate or pleader appearing on behalf of the Government or the Agent of the Court of Wards, no fee shall in any case be entered as recoverable in a decree or order except on production of a certificate signed by the advocate or pleader, that he has received such fee. There is an explanation to this rule and it is in these terms:

"The fact of a promissory note or other agreement to pay the fee having been given or made by the client does not entitle the advocate or pleader to certify that he has received the fee."

Rules have also been framed under the Legal Practitioners' Act, 1879, and rule 30 is similar to rule 95 of the Civil Rules of Practice. To rule 30 is added a similar note. No corresponding rule has been framed under the Bar Councils Act, but on the 15th January, 1933, the Bar Council, having considered the judgment of Ramesam, J., in In re *A. V. Subba Rao*[1], passed the following resolution :

"Resolved though there is no legal prohibition, the Bar Council views with disfavour the practice of taking promissory notes for fees. The Bar Council is also of opinion that the explanation to rule 95 of the Civil Rules of Practice correctly lays down the principle."

In In re *A. V. Subba Rao*[1], Ramesam, J., observed:

"There may be cases in which the fee due to a vakil may be otherwise adjusted, by which I mean an adjustment amounting to more than a mere agreement to pay, though no actual money has passed. In such cases the fee certificate cannot be said to be false. When a promissory note especially a negotiable instrument is given it may be equivalent to payment and I doubt if Note II to rule 30 in Legal Practitioners' Rules is strictly correct."

It is obvious from this statement that the learned Judge was of the opinion that a practitioner could file for purposes of taxation a certificate of payment when he had not, in fact, received his fee in cash but had in lieu received a promissory note. This is an opinion which we do not share. It would be wrong for a practitioner to present such a certificate. In fact, it would amount to professional misconduct

1. (1929) 57 M.L.J. 780.

if a legal practitioner, whether an advocate or a pleader, filed a certificate stating that he had received the amount of his fee when he had merely received from his client a written promise to pay. Of course, if he disclosed in his certificate that what he had received was a promissory note and not cash there would be nothing improper. It would be then for the Court to decide whether the fee should be allowed on taxation and it is inconceivable that the fee would be allowed, especially in view of rule 95 of the Civil Rules of Practice of this Court and rule 30 of the rules framed under the Legal Practitioners' Act.

In *Shiva Narain Jafa* v. *Judges of the High Court of Judicature at Allahabad*[1], the Privy Council held that an advocate was not guilty of professional misconduct when, in the honest belief that he was entitled to do so, he stated in his certificate of fees that he had received Rs. 140 in cash and Rs. 735 by means of a promissory note, and the certificate in that form was accepted by the District Judge. This was an appeal to the Judicial Committee from an order passed by the Allahabad High Court suspending an advocate for three months in the circumstances mentioned. The Privy Council held that the order was wrong. The judgment there does not affect the principle that an advocate will be guilty of professional misconduct if he files a certificate to the effect that he has received his fee in cash, whereas in fact he has received a promissory note in lieu of cash. In that case there was a full disclosure of the position.

In this case the respondent filed a certificate indicating payment of his fee in cash whereas he had merely received a promissory note. He says that he did it in the *bona fide* belief that he was acting properly, and as the decision of Ramesam, J., in In re *A. V. Subba Rao*[2] had not then been overruled this explanation must be accepted. It follows that we disagree with the District Judge that the respondent's action in the circumstances was improper. With the judgment in this case before him the respondent will no doubt act differently in future.

The seventh charge is to the effect that in spite of demand and without lawful cause the respondent had failed to return to Thayumanasundarathammal the records and papers which she had entrusted to him and which had come into his hands in the course of his engagement. It does appear that Thayumanasundarathammal did demand from the respondent the return of her papers and that he failed to comply with the demand. He claimed that he was entitled to a lien on the papers in respect of his outstanding fees, although when the proceedings were started he indicated his willingness to hand back the papers to her. She did not, however, take advantage of this offer and consequently her complaint does not appear to have been a serious one. In *Krishnamachariar* v. *The Official Assignee of Madras*[3], this Court held that an advocate has no lien apart from an express agreement with his client. It is not necessary to consider here whether this decision is open to question, because even if the respondent wrongly claimed a lien it would not make him guilty of professional misconduct. The honesty of the respondent in claiming a lien cannot be disputed. If he made this claim wrongly, as according to *Krishnamachariar* v. *The Official Assignee of Madras*[3] he did, then the client's proper remedy was by way of suit. There can be no professional misconduct when an advocate puts forward a claim *bona fide*. In In re *a Pleader*[4], this Court pointed out that in this country an advocate combines the functions of a solicitor and a barrister in England and, as he fulfils both roles, he must be subject to the disabilities of both. As he fulfils the role of a solicitor it may be argued that he is entitled to the advantages of a solicitor. In a suitable case the decision in *Krishnamachariar* v. *The Official Assignee of Madras*[3] may have to be reconsidered.

For the reasons given the charges against the respondent must be dismissed, and we will add that he leaves the Court without any stain on his character.

K.S. ——— *Charges dismissed.*

---

1. (1936) I.L.R. 58 All. 307.
2. (1929) 57 M.L.J. 780.
3. (1931) 62 M.L.J. 185 : I.L.R. 55 Mad, 455.
4. (1942) 2 M.L.J. 196 : I.L.R. (1943) Mad, 30 (S.B.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

The Public Prosecutor .. *Appellant**

v.

Ponnuswami Mudaliar .. *Respondent* (*Accused*).

Local Boards Act (XIV of 1920)—Prosecution for encroachment—Question of ownership though of civil nature should be decided by Magistrate—Circumstances favouring acquittal—Proper procedure.

The appellant, the owner of a house with a verandah, received a notice from the President, District Board, to remove the front portion of it alleging that the portion was an encroachment upon the public road. As the appellant did not comply with the requisition he was prosecuted and two witnesses were examined, a maistry and a karnam, and no more evidence was let in in proof of the encroachment. The Sub-Magistrate felt that the evidence was weak, but he finally found that the matter was of a civil nature and acquitted the accused on that ground.

Held, that the Magistrate cannot avoid his responsibility to go into the question of the ownership of the land and decide the dispute to the best of his ability. Any case launched under the encroachment provisions of the Local Boards Act necessarily is of a civil nature, for the Court has to decide whether the land said to be encroached upon belonged to the Local Board or to the accused.

Held, further, that the acquittal need not be set aside as the evidence for the prosecution was weak and that no fresh prosecution should be launched without giving the respondent an opportunity of paying for the encroachment just as his neighbours had been allowed to do.

Appeal under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid respondent accused by the Stationary Sub-Magistrate of Attur in C. C. No. 1320 of 1942 on his file.

K. Venkataraghavachari for Appellant.

D. Ramaswami Aiyangar for Respondent.

The Court delivered the following

JUDGMENT.—The respondent had built a house with a verandah; and he received notice from the President of the District Board to remove the front portion of it, the notice alleging that that portion was an encroachment on the public road. He failed to comply with the notice and so was prosecuted. The President examined the Local Fund survey maistry and the local karnam as P. Ws. 1 and 2; but did not file any of the survey records or any other documents in proof of the encroachment. The Sub-Magistrate felt that the evidence was rather weak, but finally found the accused not guilty on the ground that the dispute was of a civil nature. The Crown has appealed against the acquittal of the respondent.

It is needless to say that the Sub-Magistrate ought not to have disposed of this case on the ground that he has. There may be a *bona fide* dispute between the District Board and the accused about the ownership of the land; but the Magistrate cannot avoid his responsibility to go into that question and decide the dispute to the best of his ability. Any case launched under these provisions of the Local Boards Act is necessarily of a civil nature; for the Court has to decide whether the land said to be encroached upon belongs to the Local Board or to the accused. If the former and the notice was in order, then the accused has to be convicted whether he acted in good faith or not.

I do not however think that the interests of justice require that the acquittal should be set aside; because the evidence is undoubtedly weak and the prosecution have to discharge the burden in this class of criminal case as in all others of proving their case beyond all reasonable doubt. The Local Board chose to put into the box only the Local Fund maistry and the karnam, who had some general knowledge of what had taken place but were not in a position to answer the questions put to them in cross-examination. So that the Court was left in some doubt as to whether there was an encroachment or not. Moreover, the Local Board can at any time launch another prosecution if another notice is disobeyed; and it will then have an opportunity of proving in a manner more satisfactory that there was an encroachment. I may however say that in my opinion the Local Board should not launch a fresh prosecution without giving the respondent an opportunity

*Crl. App. No. 53 of 1943. 12th March, 1943.

of paying for the encroachment in the same way as his neighbours have been allowed to do. P. W. 1 says that when the President and the Assistant Engineer inspected the locality, they decided that the accused should be allowed to purchase the land on which he had encroached for the sum of Rs. 33-12-0.

The appeal is dismissed.

K.C. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Ranga Konar .. *Petitioner**

v.

Pakkiri Vattachi and others .. *Respondents.*

Criminal Procedure Code (V of 1898), section 422—Notice to complainant—Salutary practice—Appeal against order convicting accused allowed without opportunity to complainant being given—Acquittal whether to be interfered with on that ground.

Although it is not necessary under section 422, Criminal Procedure Code, to give notice to a complainant, even though the complainant was awarded compensation, it is a salutary practice to do so ; because the Crown might not choose to oppose the appeal.

Where the complainant in a case who was awarded compensation by the Stationary Sub-Magistrate, was not served with notice till very late, that is, a day previous to the hearing of the appeal filed against the order of the Magistrate by the accused,

Held, that having given a notice to the complainant the Magistrate should have also given him a reasonable opportunity to engage a vakil and to give that vakil reasonable time to prepare his case; but an acquittal cannot be lightly interfered with, merely because the Magistrate had failed to give a full opportunity to the complainant.

Petition under sections 435 and 439 of the Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the Sub-Divisional Magistrate of Tanjore, dated 30th August, 1941, and passed in Crl. Ap. No. 19 of 1941 preferred against the judgment of the Court of the Stationary Sub-Magistrate of Tanjore dated 21st July, 1941 and passed in C. C. No. 836 of 1941.

P. S. Srinivasadesikan for *A. S. Nataraja Aiyar* for Petitioner.

N. Rajagopalan for Respondents.

A. S. Sivakaminathan for the Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—The petitioner filed a complaint against a number of accused in the Court of the Stationary Sub-Magistrate, Tanjore ; and they were convicted. Rs. 25 was ordered to be paid to the complainant as compensation. The accused preferred an appeal to the Sub-Divisional Magistrate, Tanjore, and notice was apparently ordered to the District Magistrate and to the complainant. The complainant was not served at the first attempt ; and the service was effected only on the day before the appeal was to be heard. An affidavit filed by the pleader for the petitioner alleges that the petitioner came to him only at 10-45 A.M., that is, a quarter of an hour before the appeal was to be heard and represented that he had been served late the previous evening and had come straight to him. The pleader appeared in Court without a vakalat and the Magistrate could not of course hear him. The pleader then asked for an adjournment, which the same Magistrate refused. Nobody appeared on behalf of the Crown ; and so the appeal was heard *ex parte* and resulted in the acquittal of the accused. As a necessary consequence of the acquittal, the order of compensation to the petitioner was set aside. The petitioner complains that he was not given a proper opportunity of being heard.

The petitioner has no right to be heard under section 422 of the Criminal Procedure Code ; but the petition was admitted because at the time of admission it was not clear whether a notice had gone to the Crown as required under that section. The appellate Magistrate now reports that notice was given to the District

*Cr. R. C. No. 1042 of 1941. 4th March, 1942.
(Cr. R. P. No. 980 of 1941).

Magistrate. The learned counsel for the petitioner has however pointed out that rules require that in a cognizable case notice should go to the District Magistrate and to the prosecuting Inspector. I doubt whether the fact that the notice went to the District Magistrate only would be a failure to comply with the provisions of section 422 ; because section 422 refers only to one officer, namely, such officer as the Local Government may appoint in this behalf. Moreover, we do not know whether, in fact, notice was given to the prosecuting Inspector or not.

Although it is not necessary under section 422 of the Criminal Procedure Code to give notice to a complainant, even though the complainant was awarded compensation, I think it is a salutary practice to do so ; because the Crown might not choose to oppose the appeal. Some District Magistrates instruct the Public Prosecutor or the prosecuting Inspector not to appear in private cases—on the ground that the Crown is not interested in the result of the appeals. Such an attitude is to be deprecated. Although a private complainant can bring to the notice of a Magistrate the fact that an offence has been committed, the accused is convicted for infringing the law of the country ; and as it is the duty of the District Magistrate to see that the law is upheld, he should not regard a crime as of no concern to him because the complaint has been preferred by a private party. The fact that section 422 contemplates notice only to the Crown is itself an indication that the propriety or otherwise of a conviction is the concern of the Crown, the accused and the Court.

Having given notice to the complainant I think the Magistrate should have given him a reasonable opportunity to engage a vakil and to give that vakil reasonable time to prepare his case. It is true that with a little more diligence the complainant might have approached the vakil earlier ; but however prompt he might have been, the vakil would have had very little time. Nevertheless the trial and the appeal have to be regarded primarily from the standpoint of the accused ; and an acquittal cannot be lightly interfered with merely because the Magistrate has failed to give a full opportunity to the complainant. The Magistrate has written a well-considered judgment ; and it would be a great hardship for the accused to have the acquittal set aside and to be harassed by further criminal proceedings.

The petition is therefore dismissed.

K. C. *Petition dismissed.*

[PRIVY COUNCIL.]

(On appeal from the High Court of Calcutta.)

PRESENT :—LORD THANKERTON, SIR GEORGE RANKIN AND SIR MADHAVAN NAIR.

Nawab Habibulla .. *Appellant**

v.

Commissioner of Income-tax, Bengal .. *Respondent.*

Income-tax Act (XI of 1922), sections 2 (1) and 4 (3) (viii)—Wakf deriving income from agricultural land —Receipt by mutwalli of fixed monthly remuneration out of the income—Not agricultural income.

Albeit the income received by a wakf estate is within the definition of agricultural income in section 2 (1) of the Income-tax Act, the sums drawn therefrom as fixed monthly remuneration by the mutwalli of such wakf are not agricultural income rendered exempt from taxation by section 4 (3) (*viii*) of the Act.

If the remuneration had been by way of a fractional part of the income of the wakf estate or by a percentage commission, a different question might have arisen.

Sir Thomas Strangman and *C. Bagram* for Appellant.

J. Millard Tucker and *Sir Alfred Wort* for Respondent.

Their Lordships' Judgment was delivered by

LORD THANKERTON.—The appellant is the hereditary mutwalli of a wakf estate, and as such he draws remuneration, and the question in the appeal arises on a claim by him that the income thus received by him is exempt from taxation, which came before the High Court of Judicature at Fort William in Bengal on a reference by

*P. C. App. No. 11 of 1942. 14th December, 1942.

the respondent, at the appellant's request, under section 66 (2), Income-tax Act, 1922, with a statement of the case and the opinion of the respondent rejecting the appellant's claim to exemption. The question of law referred to the Court was :

"Whether in the facts and circumstances of the case the sum of Rs. 49,500 received by the assessee as his remuneration as mutwalli was 'agricultural income' within the meaning of section 2 (1), Income-tax Act?"

For the assessment year 1938-39, the appellant was assessed for income-tax purposes on an amount which included the sum of Rs. 49,500 under the head of salaries, which was the appellant's remuneration as mutwalli for the year of account and included both current salary and arrears. It is admitted that the income of the wakf estate from which the appellant's said remuneration was drawn, was "agricultural income." The wakf was created by an ancestor of the appellant by a wakfnamah dated 1st June, 1854. The post of mutwalli was made hereditary, the wakif's son being first appointed. No benefit was reserved in any way either to the wakif himself or to his descendants and no remuneration was provided for by the wakfnamah for the post of the mutwalli. In 1925, a suit in the Court of the District Judge, Dacca, in which the removal of the appellant was sought, was compromised on the basis of a scheme of administration which had been filed before the High Court and agreed to by all parties, and a decree in terms thereof was made by the District Judge of Dacca on 24th May, 1928. Under the scheme, the appellant's remuneration was provided for as follows :

"15. The remuneration of the mutwalli payable from the wakf shall be rupees two thousand five hundred monthly together with a fixed allowance of rupees five hundred monthly for his conveyance, the lighting of his apartments, medical attendance and other personal charges incidental to his position . . . . . ."

It is enough to say that it is clear that under the scheme the appellant has only powers of management of the wakf estate and that those powers are limited in certain respects by the control of a committee of management. The appellant maintains that the Rs. 49,500 received by him as his remuneration in terms of the scheme is "agricultural income" as defined in section 2 (1) of the Act of 1922, and that it is therefore rendered exempt from taxation by section 4 (3) (*viii*) of the Act. The relevant part of section 2 (1) is as follows :

"2. In this Act, unless there is anything repugnant in the subject or context,—

(1) Agricultural income means—

(*a*) any rent or revenue derived from land which is used for agricultural purposes, and is either assessed to land-revenue in British India or subject to a local rate assessed and collected by officers of Government as such.

The High Court rejected the appellant's contention, and their Lordships agree with their conclusion. The appellant's counsel referred to the recent decision of this Board in *Income-tax Commissioner, Bihar and Orissa* v. *Maharajadhiraj of Dharbanga*[1], the judgment being delivered by Lord Macmillan. In that case a money-lender had lent money on a zarpeshgi lease and usufructuary mortgage of agricultural lands under which he was in possession with all the powers of an owner, and upon the terms that, after deducting from a gross estimated rental the estimated costs of management and a sum (thika rent) which was to be credited, he was to take the balance (thika profits). There was no dispute that the rents so drawn by him were agricultural income within the meaning of section 2 (1) (*a*) of the Act, and it was conceded that if the assessee had not been a money-lender and the transaction in course of his money-lending business, the statutory exemption would have applied, but it was maintained that the income was income, profits and gains of the business, and that it thereby lost the benefit of the exemption. The Board held that the result of the exemption is to exclude "agricultural income" altogether from the scope of the Act, howsoever or by whomsoever received, and that the nature of the assessee's business cannot affect the exemption. In the opinion of their Lordships, that case affords a useful contrast to the present case. The position of the assessee in that case had been described by the Chief Justice of Patna—and this Board adopted the description—as follows :

"The mortgagee-lessee was to be in possession of both properties, and, in his relation to th

1. (1935) 69 M.L.J. 474 : L.R. 62 I.A. 215 : I.L.R. 14 Pat. 623 (P.C.).

cultivators of the soil he stood in the position of landlord, dealing directly with them and collecting the rents. He had moreover to pay the Government revenue, cesses and taxes and his name was registered in the Land Registration Department. He alone was able to sue for rent whether current or arrears, to sue for enhancement or for ejectment and was able to settle lands with raiyats and tenants in all the properties, in fact he was in a position to take all proceedings which the mortgagor would have been able to take in the ordinary course if the lands leased and mortgaged had remained in her khas possession."

Accordingly, the assessee collected the rents directly in his own right, and the amount of his income therefrom depended on his exercise of these rights. The position of the appellant is very different—the recovery of the rents depends on the rights of the wakf estate, and, on the appellant's performance of his duties of management as mutwalli and the amount of his remuneration does not depend either on the nature of the properties or assets which constitute the wakf estate, nor on the amount of the income derived therefrom by the wakf estate. If, as might possibly happen, the whole or a portion of the wakf property ceased to be represented by agricultural lands, it is clear that the remuneration fixed by Art. 15 of the scheme would not be affected. Their Lordships agree with the High Court in holding that, albeit the income received by the wakf estate is within the definition of agricultural income in section 2 (1), the sums drawn therefrom as remuneration by the appellant are not agricultural income received by the appellant, and the question of law referred to the Court should be answered in the negative. Their Lordships desire to add that a different question might have arisen if the appellant's remuneration had been by way of a fractional part of the income of the wakf estate, or by a percentage commission. That case may be considered if, and when, it arises, and their Lordships express no opinion thereon. Accordingly, their Lordships will humbly advise His Majesty that the judgment of the High Court should be affirmed, and that the appeal should be dismissed with costs.

Solicitors for Appellant : *W. W. Box & Co.*

Solicitors for Respondent : *Solicitor, India Office.*

K.S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ABDUR RAHMAN AND MR. JUSTICE SOMAYYA.

Sri Kallalagar Devasthanam by its Executive Officer K. N. Radhakrishnan .. *Appellant** (*1st Deft.*)

v.

Thiruvengadathan Thirumalai Nambigal and another. *Respondents.* (*Plff. & 2nd Deft.*).

Madras Hindu Religious Endowments Act (II of 1927), sections 43 (1) and 73 (3)—Non-excepted temple—Archaka—Dismissal of, by trustee without a personal hearing—Confirmation of order of dismissal by Board—Suit in Civil Court against order—Suit whether barred—Flagrant violation of principles of natural justice justifies intervention of Civil Court.

A hereditary archaka and mirasi service-holder in a non-excepted temple to which the provisions of the Hindu Religious Endowments Act applied died childless and his widow adopted the plaintiff who was a minor at the time of the adoption. During his minority his natural father acted for him and instituted certain suits on his behalf in which the propriety of certain orders passed by the trustee and the Board were questioned. After the plaintiff attained majority he wrote to the trustee (first defendant) that for sometime he could not himself perform his duties owing to illness and had appointed his agent in his stead to do them. But the trustee called upon him to comply with certain conditions the non-performance of which would entail his dismissal. The plaintiff in reply wrote that he was willing to comply with them, that he would be able to attend to his duties personally only after some time and that his willingness to comply was to be without prejudice to the cases that were then pending in Court against the trustee and the Board.

The trustee thereupon dismissed the plaintiff without a hearing in person and on appeal to the Hindu Religious Endowments Board, the order was confirmed under section 43 (1) of the Act. On a suit in the Civil Court being filed against the decision of the Board it was held by the lower Court that (1) the plaintiff did not disobey the orders of the trustee; and (2) in spite of section 43 (1) and section 73 of the Act, since there had been such a flagrant violation of the principles of natural justice in giving a decision without giving an opportunity to the plaintiff to explain his own actions, the suit will lie. On appeal therefrom by the trustee,

Held, (1) that the Civil Courts had the power to go into the question and ascertain whether any of the reasons did in fact exist which would confer jurisdiction on the trustee to act under section 43

*Appeal No. 299 of 1940. 28th August, 1942.

and if it found that they did not exist (as found in this case) the trustee should be held to have exceeded the powers conferred by section 43 of the Act and the decision of the Board could not therefore be regarded as final.

Ramanatha Gurukkal v. *Arunachalam Chettiar*, (1938) 2 M.L.J. 516: I.L.R. (1939) Mad. 81 and (1940) 1 M.L.J. 352: I.L.R. (1940) Mad. 825, referred to.

(2) That the words " administration or management " used in sub-clause (3) of section 73 have been employed with reference to the ' religious endowments ' as defined in the Act and could not be taken to cover or include the case of the dismissal of an ' archaka '. The suit to set aside his dismissal related to a personal right and so long as there was no question relating to the administration or management of the endowed property the suit could not be held to be barred under that section.

Vythilinga Pandara Sannadhi v. *The Temple Committee, Tinnevelly Circle*, (1931) 61 M.L.J. 815 : I.L.R. 54 Mad. 1011 and *Vythilinga Pandara Sannadhi* v. *Ranganatha Mudaliar*, (1933) 66 M.L.J. 98 : I.L.R. 57 Mad. 362, relied on.

(3) The plaintiff's dismissal without his being given an opportunity to explain his conduct, solely on account of the sins committed by his father, should be held to contravene principles of natural justice.

Secretary of State for India v. *Mask & Co.*, (1940) 2 M.L.J. 140 : L.R. 67 I.A. 222 : I.L.R. (1940) Mad. 599 (P.C.), referred to.

Appeal against the judgment dated 21st February, 1940, of the Court of the Subordinate Judge, Madura, in O. S. No. 72 of 1939.

C. S. Swaminathan for Appellant.

R. Gopalaswami Aiyangar, *K. Vydinathan*, *P. V. Rajamannar* and *M. Chockalingam* for Respondents.

The Judgment of the Court was delivered by

Abdur Rahman, J.—The main question that falls to be determined in this appeal is one of competency of the Civil Courts to entertain the suit.

Gnanapiran Thirumalai Nambigal was the hereditary *archaka* and mirasi service-holder in a non-excepted temple to which the provisions of the Hindu Religious Endowments Act apply. He died childless in July, 1917, but his widow adopted the present plaintiff to her husband. The plaintiff was then a minor and was to attain majority on the 26th August, 1938. During the period of his minority his natural father, Srinivasa Ayyangar, acted as his guardian and performed the duties in the temple as his deputy. Srinivasa Ayyangar was removed by the first defendant who is the executive officer of the temple, on the 18th January, 1938 and proceedings were started by him before the Deputy Collector, Melur and the Sub-Collector, Dindigul, to resume the inam lands granted to the plaintiff's ancestors for the services in the temple during his minority. It may also be mentioned here that certain suits had been instituted by Srinivasa Ayyangar on behalf of the plaintiff in which the propriety of orders passed by the trustee (the first defendant) and the Board (the second defendant) was questioned. They were pending at the time when the plaintiff attained majority.

Three days after attaining his majority the plaintiff wrote, Ex. B, to the trustee (the first defendant) informing him that he (*i.e.*, the plaintiff) would not be able to take charge of his duties for a period of two months on account of his illness. To this letter a medical certificate was attached. This was followed by another letter Ex. C, dated the 23rd October, 1938, in which the plaintiff, although anxious to take charge of his *nirvahams* expressed his inability so to do for a period of another three months on account of his ill-health. A medical certificate by the same practitioner who had certified to his illness before was also attached to this application. No reply was given by the trustee to these applications. But the fact remains that the plaintiff had not assumed the charge of his duties when he was served with a letter (Ex. D) on the 15th January, 1939, calling upon him to comply with certain conditions and informing him that the resumption proceedings of the inam lands would be withdrawn if he undertook to abide by them within 24 hours. One of these conditions was that the plaintiff should discharge his duties personally and to appoint a temporary agent for the purpose if he had not recovered from his illness. He was also called upon "to follow, obey and respect the orders and directions of the Hindu Religious Endowments Board " in certain proceedings, a list of which was appended. To this the plaintiff sent his reply (Ex. E). Since the order of the plaintiff's dismissal (Ex. F) dated the 19th January, 1939, is based

on this letter which was read by the first defendant as containing not only "a taunt and ridicule thrown at this administration, but an insult more poignant than the injury," "an euphemistic denial to perform his legitimate and ordained and unquestionable duties, whose evasion, no well-ordered institution could afford to tolerate" and as leading to the inference that he meant to be "a titular service-holder performing practically no service," it would be better to read it *in extenso*. Ex. E reads as follows :

"Yadast submitted by Thiruvengadathan Thirumalai Nambigal, hereditary stanika of the aforesaid devasthanam :

1. I received your R.O.C. No. 4148, dated 15th January, 1939, to-day, through my natural brother.

2. I am ever ready to attend to the stanika miras kainkaryams in the Sri Kallalagar Devasthanam, according to mamool and in accordance with practice and custom, which I have now obtained under hereditary right and which belonged to my ancestors hereditarily and which were in their enjoyment.

3. But I am not responsible for the proceedings taken against my natural father for a mistake alleged to have been committed by him when he was doing duty during my minority and for the orders passed in connection therewith. Nor can they be binding on me.

4. Further, in respect of the Board orders referred in your aforesaid letter, cases are pending wherein I figure as plaintiff and the devasthanam as defendants. Without prejudice to my contentions in the aforesaid cases, I am now prepared to take charge of my kainkaryams.

5. I have no objection also to have the accounts between us mutually settled without prejudice to my cases as aforesaid and contentions thereto.

6. As I have still some inconveniences which do not permit me to attend personally to my temple kainkaryams, I have made arrangements with Sri Seshadri Ayyangar Avergal, the hereditary stanika of Perumal temple at Sri Vanamamalai also known as Todadri and the husband of my natural sister, to do duty as agent on my behalf, for sometime and with the individuals who were employed by you for doing the work, to be attending to my kainkaryams on my behalf. I trust that you would agree to the aforesaid arrangement.

7. I trust that you would therefore cause the proceedings in the Court of the Divisional Officer, Melur and the Court of the Subordinate Judge, Dindigul, referred in your letter to be stayed and cause suitable orders to be passed as aforesaid.

17—1—39. (*Sd.*) G. Thiruvengadathan Thirumalai Nambigal."

In answer to the order communicating his dismissal the plaintiff made another representation (Ex. J) but as this elicited no response, he appealed to the Board *inter alia* on the grounds that his letter Ex. E had been either misread or a very uncharitable construction was being placed upon it, that he had been condemned unheard without framing a charge or giving him any opportunity to show cause against any specific breach and that his dismissal even before he had entered the service was without jurisdiction and clearly unjust. He denied that he had ever refused to abide by the order of the Board. The statement about the plaintiff's inability to assume his duties on the ground of his illness, although not questioned by the trustee and in fact to a certain extent admitted in Ex. D, was not accepted by the Board as correct and it was held that "the appellant ceased to render service to the temple from the date of his majority (26th August, 1938) without any just or lawful excuse and caused great inconvenience to the conduct of the service in the temple." It was also held that "On 15th January, 1939, the trustee gave him an opportunity to enter upon his duties and to give an undertaking to abide by the orders of the Board issued with regard to the appellant's duties. The appellant already failed to obey the orders of the trustee. Therefore he is guilty of disobedience of lawful orders of the trustee within the meaning of section 43 of the Hindu Religious Endowments Act." After indulging in certain generalities with which apparently the appellant had no concern and holding that section 43 of the Act did not require any "regular charges to be framed against the appellant" the order of the trustee dismissing him was confirmed and his appeal rejected (Ex. H).

The plaintiff then instituted the suit out of which the present appeal arises. It was brought against the trustee (the first defendant) and as against the Hindu Religious Endowments Board as the second defendant and asked for a declaration that the orders passed by them regarding the plaintiff's dismissal (Ex. F and Ex. H) were *ultra vires* of them and "wholly illegal and unjust." In reply it was contended on behalf of the first defendant that a suit of this nature did not lie in a Court of

civil jurisdiction and that the orders passed by the Hindu Religious Endowments Board, were final and conclusive. The order Ex. F was also attempted to be maintained on its merits. The attitude adopted by the Board was more or less the same. They had indeed adopted the written statement filed on behalf of the first defendant. The question as to the maintainability of the civil suit formed the subject-matter of issue 2 and the question whether the orders were passed by the defendants "without a proper hearing and without a proper opportunity to the plaintiff to put forward his case and in violation of the fundamental principles of procedure and justice" was put into the third issue. Whether there was no sufficient cause to dismiss the plaintiff was covered by the first one.

Inasmuch as the plaintiff had been dismissed before the expiry of five months for which he had asked for leave immediately after the attainment of his majority and no other reason was assigned in Ex. F or Ex. H-1 at least so far as he was concerned except what was stated in his applications Ex. B, Ex. C or in his reply Ex. E, no oral evidence was led on behalf of the parties and the matter was left to be decided on the documents produced on their behalf. Of these the most important have been already referred to by us. The learned Subordinate Judge of Madura held that having regard to the facts that the plaintiff had not assumed the charge of his duties and had no opportunity to work in the temple, it was "meaningless to say that he disobeyed orders or that he failed to perform duties" . . . . "especially when the plaintiff expressed his readiness to do service as required by the trustee without prejudice to the suits." In short he found on the first issue that the various grounds set out in Ex. F were not valid and could not operate as against the plaintiff "however much they might be enforcible against the deputy." He pointed out in paragraph 13 of his judgment :

"If only charges had been framed against the plaintiff or even without the charges plaintiff had been called upon to explain any particular matters put to him, the circumstances show that plaintiff would have convinced the trustee and an order like Ex. F would never have seen the light of day."

For the above reasons Ex. F, and for reasons which it is hardly necessary to re-state (couched in rather strong language—perhaps justifiable in the circumstances) Ex. H were found to be indefensible. As for the contention that these orders (Ex. F and Ex. H) were not open to scrutiny by Civil Courts and that sections 43 and 73 barred the present suit, the learned Subordinate Judge was of the view that inasmuch as the order, Ex. F, was not "covered by any of the offences mentioned in section 43 (*i*)" and there had been such a flagrant violation of principles of natural justice, either the section 43 (*i*) did not apply or that if it did, the finality was taken away by a violation of the principles of natural justice in giving a decision before giving any opportunity to the plaintiff to explain the deeds of omission or commission which, it was thought, he had committed. On these findings, the suit was decreed. The first defendant appeals.

A perusal of the letter, Ex. E, leaves no doubt in our minds that the plaintiff was willing to abide by the conditions stated by the first defendant in Ex. D and the comment made by him (*i.e.*, the trustee) in regard to paragraph 4 of the letter was wholly unjustifiable. The plaintiff had expressed his willingness in that paragraph to take charge of his duties and it is impossible to read that paragraph either by itself or along with the other paragraphs so as to spell his "utter unwillingness to discharge his duties." The fact that the plaintiff had stated that he was prepared to take charge without prejudice to his contentions in the aforesaid cases cannot imply that he was not prepared to do so. The plaintiff appeared to be anxious to safeguard his rights in regard to certain matters which were pending in Courts and this he was fully entitled to do. The plaintiff did not take up the position that he would not perform his duties until the matter was finally determined by Civil Courts. He only urged that the execution of his duties should not in any way prejudice his rights in Court. We cannot see what possible objection could be raised to such a reservation unless the idea was to place the plaintiff's consent to act in pursuance of the conditions imposed by the first defendant before the Court and to try and obtain a decision from the Courts against the former on account of

his conduct. A great deal of stress was laid by the trustee on his use of the words "according to mamool and in accordance with practice and custom." But we see nothing in this statement even if it is taken to mean that the plaintiff was not prepared to be bound by an agreement (Ex. III) which his natural father had executed during his minority. Reading Ex. E as strictly against the plaintiff as it is possible for us to do, we are unable to find anything in it to which any exception could possibly have been taken by the defendants. His nomination of his brother-in-law, Seshadri Ayyangar, to act as his agent was in accordance with the third condition in Ex. B and his request to the trustee "to carry on the work during his illness with the individuals who were employed by you (the first defendant) for doing the work" instead of savouring of disobedience points to his co-operation. The plaintiff cannot thus be regarded to have been guilty of any disobedience of lawful orders. Nor can he be, in view of his illness, held to have committed any neglect of duty.

The question then is whether sections 43 and 73 of the Madras Hindu Religious Endowments Act preclude the Civil Courts from going into the question after the matter was decided by the trustee and his decision was confirmed by the Board. The relevant provisions of section 43 read as follows:

"(1) All office-holders and servants attached to a temple or in receipt of any emolument or perquisite from the temples shall be under the orders and control of the trustee; and the trustee may fine, suspend, remove or dismiss any of them for breach of trust, incapacity, disobedience of lawful orders, neglect of duty, misconduct or other sufficient cause:

Provided that . . . . .

(2) Any office-holder or servant of a temple other than an excepted temple punished by a trustee under sub-section (1) may, within such time as may be prescribed, appeal to the committee whose decision shall in the case of a non-hereditary office-holder or servant be final.

(3) A hereditary office-holder or servant of a temple, other than an excepted temple may, within such time as may be prescribed, prefer a further appeal to the Board against the order of a committee on an appeal under sub-section (2) and the decision of the Board shall be final.

(4) . . . ."

Section 73 on which reliance was also placed by learned counsel for the appellant provides as follows:

"(1) The Board or any person having interest and having obtained the consent of the Board may institute a suit in the Court to obtain a decree—

(*a*) appointing or removing the trustee of a math or excepted temple (or of a specific endowment attached to a math or excepted temple),

(*b*) vesting any property in a trustee,

(*c*) declaring what proportion of the endowed property or of the interest therein shall be allocated to any particular object of the endowment,

(*d*) directing accounts and inquiries, or

(*e*) granting such further or other reliefs as the nature of the case may require.

(2) . . . .

(3) Sections 92 and 93 and rule 8 of Order 1 of the first schedule of the Code of Civil Procedure, 1908, shall have no application to any suit claiming any relief in respect of the *administration or management of a religious endowment* and no suit in respect of *such* administration or management shall be instituted except as provided by this Act."

Taking up section 43, first, it might be mentioned here that no Committee such as is referred to in sub-clause (2) of that section appears to have been constituted. It was therefore urged by learned counsel for the respondent that section 60 (*a*) which provides for the exercise of all or any of the powers and for the performance of all or any of the duties of the Committee by the Board and its President in case the Committee has not been constituted or is not in existence can only refer to a temporary absence of the Committee and could not be held to apply when a Committee contemplated by that sub-clause had never been constituted at all. This would, he contended, have the effect of depriving the party entitled to appeal from a right of appeal to that body and to a further appeal to the Board and its President. There is no force, in our opinion, in that contention. The words in section 60 (*a*) of the Act are quite general and provide for the exercise of the right by the Board and its President in all cases where a Committee such as is referred to in sub-clause (2) to section 43 "has not been constituted or is not in existence." There is nothing in that section which gives the slightest support to the contention that it was intended to apply only when the Committee did not happen to be in existence only temporarily.

Learned counsel for the appellant placed a great deal of reliance on the decision in *Ramanatha Gurukkal* v. *Arunachalam Chettiar*[1] which was affirmed in the Letters Patent Appeal by a Division Bench of this Court in *Ramanatha Gurukkal* v. *Arunachalam Chettiar*[2]. It was held by our learned brother Wadsworth, J., that inasmuch as section 43 of the Religious Endowments Act had set up a special machinery for appeals and had conferred finality on their decision, the propriety of the order passed by the trustee under that section could not be questioned in Civil Courts by an office-holder who had been dismissed by the trustee in the exercise of the powers of administration and management conferred upon him under the said Act. We will go into the question of the meaning of the expression "in respect of such administration and management of a religious endowment" used in sub-clause (2) of section 73 of the Act when we are dealing with that section. But there can be no room for doubt that if the trustee has really acted in the exercise of the powers conferred on him under section 43 (1) and has fined, suspended, removed or dismissed an office-holder or a servant attached to a non-excepted temple for (*a*) breach of trust, (*b*) incapacity, (*c*) disobedience of lawful orders, (*d*) dereliction of duty, (*e*) misconduct, or (*f*) for other sufficient cause, the order of the trustee if confirmed both by the Committee (provided the Committee was in existence) and the Board and if the Committee did not happen to exist by the Board alone, shall be final and cannot be subsequently challenged in a Civil Court. It was so held by Wadsworth, J., and by the Division Bench in the Letters Patent Appeal in the case to which we have referred.

We must, however, make it clear that it is only in cases where the trustee has actually acted for the reasons given in sub-clause (1) of section 43 and enumerated in the last paragraph that the provisions of sub-clauses (2) and (3) can be attracted. If the trustee is, on the other hand, found to have fined, suspended, removed or dismissed an office-holder or a servant attached to a temple either for reasons other than those mentioned in sub-clause (1) or although he purported to act for one of the reasons mentioned in that sub-clause, those reasons were not in fact found by him to have existed, the order of the trustee would not fall within the purview of sub-clause (1) of that section and the orders of the Committee or of the Board could not be consequently held to be final under the latter sub-clauses. In the decision of the Letters Patent Appeal cited above, the archaka was, as stated by the Honourable the Chief Justice in his judgment, suffering from leucoderma and was dismissed from his office by the trustee at least ostensibly on that ground. If that ground did exist, as held by Wadsworth, J., it may be regarded as sufficient "to clothe the trustee with the power to pass an order of dismissal under section 43 of the Act" on the ground of incapacity. It is thus clear that the contention advanced in this case that the Civil Courts could not go into the question even if the trustee had not acted for any of the reasons stated in sub-clause (1) to section 43 was not considered in the Letters Patent Appeal, although Wadsworth, J., appears to have been inclined to the opinion (he does not say so very clearly), that the trustee might not have had the power to dismiss the archaka if the reasons for his dismissal were not to be found within the four corners of sub-clause (1) of the section and conferred jurisdiction on the trustee to so act. In any case, whether Wadsworth, J., was or was not of that view, there is no manner of doubt in our minds that a trustee can exercise the powers mentioned in sub-clause (1) of section 43 only when the reasons given in that sub-clause are found by him to have existed, and not merely because he purports to seek shelter behind them on grounds which could not be brought within the ambit of sub-clause (1). It is true that a Civil Court is not a Court of Appeal; but it is open to a Civil Court to examine the grounds on which the trustee has acted and to ascertain whether they could or could not be brought under the section. In dealing with the jurisdiction of Civil Courts although in regard to the Sea Customs Act, the following observations of their Lordships of the

1. (1938) 2 M.L.J. 516 : I.L.R. (1939) Mad. 81.

2. (1940) 1 M.L.J. 352 : I.L.R. (1940) Mad. 825.

Privy Council in the *Secretary of State for India* v. *Mask & Co.*[1] are pertinent:

"It is settled law that the exclusion of the jurisdiction of the Civil Courts is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied. It is also well settled that even if jurisdiction is so excluded, the Civil Courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure."

The last portion of this observation would be relevant to another contention raised on behalf of the first respondent and we would deal with that later; but in so far as the present question is concerned, the power of the Civil Courts "to examine into cases where the provisions have not been complied with" was expressly recognised in that decision. We would therefore hold that the Civil Courts have the power to go into the question and to ascertain whether any of the reasons did in fact exist which would confer jurisdiction on the trustee to act under section 43 and if it be found that they did not exist (as we had already found in this case) he must be held to have exceeded the powers conferred on him by section 43 of the Hindu Religious Endowments Act and the decision of the Board could not, therefore, be regarded as final. And in the absence of the finality of that decision, the jurisdiction of the Civil Courts could not be found to have been ousted.

The next question to decide is whether the civil suit would be barred under section 73 of the Act. In *Ramanatha Gurukkal* v. *Arunachalam Chettiar*[2], Wadsworth, J., expressed the view that a suit by an office-holder or servant of the temple to set aside his dismissal by a trustee must be regarded to be a suit in respect of the administration or management of the religious endowment within the meaning of section 73 of the Act and would therefore be barred. The Division Bench did not, however, on appeal from his judgment consider this aspect of the case.

It is unnecessary in this case to go into the question whether the expression "except as provided by this Act" should be taken to convey the idea of being "contrary to the provisions of this Act" as held by Curgenven, J., in *Vythilinga Pandara Sannadhi* v. *The Temple Committee, Tinnevelly Circle*[3], or to mean as "except under the provisions of this Act" as understood by Venkatasubba Rao, J., in *Vythilinga Pandara Sannadhi* v. *Ranganatha Mudaliar*[4]. Nor is it necessary for the purposes of the present case to examine the question whether the words "administration or management" used in sub-clause (3) of section 73 were meant to be more comprehensive than what was contained in section 73 (1) of the Act as held by Venkatasubba Rao, J., in the above case or were meant to cover such acts of administration only as were enumerated in that sub-clause as appears to have been decided in *Trikaderi Manekal Vasudevan Adiserpad* v. *Thekkamparambath Manakal Bhawadasan Nambudiri*[5] to both of which it is interesting to observe, Ramesam, J., was a party. It is sufficient for our purposes however to ascertain whether the dismissal of the plaintiff archaka by the trustee can be regarded to be an act of "administration or management of a religious endowment." It is only "in respect of such administration or management" that a suit can be held to be barred. The term "religious endowment" has been defined in section 9, sub-clause (11) of the Act to mean,

"all property belonging to, or given or endowed for the support of, maths or temples or for the performance of any service or charity connected therewith and includes the premises of maths or temples but does not include gifts of property made as personal gifts or offerings to the head of a math or to the archaka or other employee of a temple."

If the words "administration or management" used in sub-clause (3) of section 73 have been employed with reference to the "religious endowment" as defined in the Act and this is what is stated in that sub-clause, it appears to be clear that they could not possibly be taken to cover or include the case of a dismissal of an archaka of a temple. The administration or management must be with reference to the "religious endowment," that is, with reference to the property mentioned in the definition and not with respect to the dismissal of an archaka. The suit to set

---

1. (1940) 2 M.L.J. 140 : L.R. 67 I.A. 222 : I.L.R. (1940) Mad. 599 (P.C.).
2. (1938) 2 M.L.J. 516 : I.L.R. (1939) Mad. 81.
3. (1931) 61 M.L.J. 815 : I.L.R. 54 Mad. 1011.
4. (1933) 66 M.L.J. 98 : I.L.R. 57 Mad. 362.
5. (1933) I.L.R. 57 Mad. 315.

aside his dismissal relates to a personal right and as long as there is no question relating to the administration or management of the endowed property, the suit cannot be held to have been barred under that section. Our learned brother Wadsworth, J., appears to have conceded this to a large extent in the first sentence of the penultimate paragraph of his judgment at page 86. But it seems to us, and we say so with great deference to him, that he did not take the definition of the term religious endowment as given in the Act into consideration and thus came to the view in a general sense that " a suit to set aside a dismissal by a trustee in the exercise of his powers " was " a suit in respect of the administration or management of a religious endowment." It was held in *Vythilinga Pandara Sannadhi* v. *The Temple Committee, Tinnevelly Circle*[1], that a suit by a temple trustee against the Temple Committee and others to establish his hereditary right to trusteeship related to a personal claim and was not one in respect of the administration or management of the endowment. This view was accepted by Venkatasubba Rao, J., in *Vythilinga Pandara Sannadhi* v. *Ranganatha Mudaliar*[2]. If that were so in the case of a trustee who is after all to administer and manage the endowment, it would apply *a fortiori* to the case of an archaka whose province it is merely to conduct a worship in the temple and not to administer or manage the religious endowment of the temple. We are, for the above reasons, of opinion that section 73 cannot be held to bar the present suit.

This is sufficient to dispose of the appeal. But it is contended by learned counsel for the respondents that inasmuch as no charge was framed against the archaka and he was not asked to submit any explanation although he was a hereditary archaka and did not hold the office at the trustee's pleasure, the order of dismissal must be regarded to have been passed in contravention of the principles of natural justice and must also, for that reason, be declared not to be binding on the plaintiff. There is, in our opinion, considerable force in that contention. We have pointed out in our judgment that the plaintiff was a minor till the 26th August, 1938, and had not assumed the charge of his duties as a hereditary archaka when he received Ex. D on the 17th January, 1939, or when he was ordered to be dismissed on the 19th January, 1939, under the order Ex. F. From a perusal of the various applications and orders on record, it is clear that the plaintiff was dismissed before he had been required to submit any explanation. It is also clear that he was dismissed not because of any disobedience of lawful orders or of any neglect or misconduct in the discharge of his duties. He appears to have been dealt with in that high-handed manner simply because he did not withdraw the suits which his natural father had instituted on his behalf as his next friend during his minority. It was clearly stated by the plaintiff in his letters that he was willing to assume the charge of his duties without prejudice to the cases that were pending in Court. And this, in our opinion, he was fully entitled to do. The plaintiff's dismissal without giving him any opportunity to explain his conduct solely on account of the sins committed by his father (even if the framing of charges in a formal manner may not be regarded as essential) must be held to contravene the principles of natural justice as observed by their Lordships of the Privy Council in the last sentence of the passage that we have quoted from the *Secretary of State for India* v. *Mask & Co.*[3] We must therefore hold the order of dismissal by the trustee to be unsustainable on that ground as well.

For the foregoing reasons the appeal fails and is dismissed with costs of the first respondent. The costs will be borne by the appellant personally.

K.C. ——— *Appeal dismissed.*

---

1. (1931) 61 M.L.J. 815 : I.L.R. 54 Mad. 1011.
2. (1933) 66 M.L.J. 98 : I.L.R. 57 Mad. 362 at 367.
3. (1940) 2 M.L.J. 140 : L.R. 67 I.A. 222 ; I.L.R. (1940) Mad. 599 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ABDUR RAHMAN.

Matte Atchutarama Rao .. *Appellant** (*Plaintiff*)

v.

Solasa Bapanayya, Trustee, Vijjapu Kamakshamma Charities, Rajahmundry and others .. *Respondents* (*Defts. 1 to 7 and 9 to 19—Respts.*).

Civil Procedure Code (V of 1908), section 73 (2)—Scheme suit—Decree for recovery of money by new trustee against estate of old trustee—Other creditors of the estate of the old trustee—Rateable distribution—Whether the right to recover the money under the scheme is executable.

An endowment of properties was made for charities and one *S* was appointed trustee. *S* was found to have failed in his duties and a suit under section 92, Civil Procedure Code, was filed for the removal of *S* from trusteeship and for the settlement of a scheme for the working of the trust. Before filing his written statement, *S* died, and his legal representatives were made parties in the suit in which a scheme was framed and the present first defendant was appointed trustee. Not being satisfied with the decree of Court the new trustee (first defendant) brought another suit for a declaration of his rights as trustee for recovering moneys decreed in the previous suit from out of the estate of *S*. A decree was passed entitling the trustee to recover the amounts from the assets of *S* and creating a charge for the recovery of the same over all the properties of *S*. In the meanwhile three other decrees had been obtained against the estate of *S* by other creditors of *S*, one of whom was the appellant. All the creditors including the trustee (first defendant) as well as the appellant applied for rateable distribution under section 73 of the Civil Procedure Code. On the question whether the original decree by which the trustee was enabled to recover moneys was not a decree for money and hence inexecutable,

Held, that the decree was not one for payment of money and was not executable. To say that the realisation of trust property, on which the foundation of the scheme rested, was outside its pale and could not be said to relate to permanent arrangements or a permanent scheme of administration, would be incorrect.

Appeal against the decree of the District Court of East Godavari at Rajahmundry in A. S. No. 98 of 1938, preferred against the decree of the Court of the District Munsiff of Rajahmundry in O. S. No. 191 of 1937.

K. S. Champakesa Aiyangar and *P. Veeraraghavalu* for Appellant.

M. S. Ramachandra Rao, O. T. G. Nambiar instructed by *King and Partridge, P. Somasundaram, M. Krishna Rao, M. V. Nagaramayya, V. Suryanarayana, P. V. Rajamannar* and *K. Subba Rao* for Respondents.

The Court delivered the following

JUDGMENT.—This appeal arises out of a suit under section 73 (2) of the Code of Civil Procedure for refund of certain assets paid to the first defendant on his application for rateable distribution. The facts which led to the present suit are that one Vijjapu Kamakshamma executed a will on the 16th September, 1918, bequeathing her *stridhanam* properties of the value of Rs. 20,000 for the establishment of a public water-shed and a public choultry for feeding people and appointed her brother Nalam Subrahmanyam as an executor and a trustee for carrying out her directions contained in the will. On the allegation that Nalam Subrahmanyam had failed to carry out the directions in his sister's will after her death, a suit O. S. No. 8 of 1932 under section 92, Civil Procedure Code, was instituted in the Court of the District Judge of East Godavari at Rajahmundry for Nalam Subrahmanyam's removal from the trusteeship and for the settlement of a scheme. Nalam Subrahmanyam died before filing a written statement and his son and widow were brought on record as his legal representatives. A decree (Ex. B) was eventually passed against these representatives on the 11th February under which a scheme was framed by the Court and the present first defendant (who had applied for and succeeded in getting rateable distribution) was appointed as a sole trustee for the management of the trust. The following provisions of the decree are important :

(1) that the suit trust be managed by a single trustee as per terms of the scheme hereto appended ;

(3) that the trust property do consist of Rs. 29,886-6-9 as on this date and that it do carry further interest at 6 per cent. per annum ;

(4) that the trustee do realise the trust properties and administer the same as per the scheme hereto appended ;

---

*S. A. No. 654 of 1940. 2nd April, 1942.

(5) that the defendants 2 and 3 do pay the plaintiffs Rs. 604 as and for their costs in the suit and do bear their costs in the suit being Rs. 201 ; and

(6) that the defendants 2 and 3 do deliver the utensils and articles as per list below to the trustee within two months from this date and in default do pay Rs. 157-14-3 their value to the trustee."

The only clause which is of any consequence in the scheme framed by the Court and attached to the decree reads as follows :

" 4. All the trust properties either cash or moveables shall vest in the trustee for the time being and he shall take possession of the same through Court if necessary in execution of this decree and manage the same on behalf of the public."

Not being satisfied with the decree Ex. B that was passed on the 11th February, 1933, the trustee appointed under that decree brought a suit O. S. No. 57 of 1934 in the same Court for a declaration that he had a right to recover the money decreed in O. S. No. 8 of 1932 from out of the assets of the late Nalam Subrahmanyam in the hands of the first defendant and that the trust had a charge over the properties of the deceased Subrahmanyam generally and over the properties A to E mentioned in the schedule attached to the plaint in particular. The important clauses of the decree (Ex. A) passed in that suit on the 15th September, 1936, are

" 1. That the plaintiff be and hereby is entitled to recover from the assets of the late Nalam Subrahmanyam in the hands of the first defendant the money decreed in O. S. No. 8 of 1932 on the file of this Court.

2. That a charge for the recovery of the money decreed in clause (1) *supra* be, and the same hereby is, created over all the properties proved to have been acquired by the late Nalam Subrahmanyam after 11—6—1924.

3. That the question which of the properties have been acquired by the late Nalam Subrahmanyam after 11—6—1924 be determined by the executing Court in execution proceedings."

The other clauses in the decree only provided for costs and need not be reproduced.

In the meantime, three decrees were obtained against the estate of Nalam Subrahmanyam. The appellant obtained a decree for Rs. 70,000 and odd in O. S. No. 79 of 1931. A decree in O. S. No. 19 of 1933 was obtained by the third defendant and defendants 7 to 10 had secured a decree in O. S. No. 23 of 1933. The decrees in these two suits were being executed in the Court of the District Judge of East Godavari and Subrahmanyam's assets were expected to be received by the executing Court in these executions. This led to a number of creditors including the first defendant and the appellant to make applications for rateable distribution. They were allowed although the executing Court was of opinion that in view of the decision in *Bava C. Vaithilinga Mudaliar* v. *The Board of Control, Sri Thyagarajaswami Devasthanam, Tiruvarur*,[1] the decree passed in O. S. No. 8 of 1932 on the basis of which the first defendant had made his application was inexecutable. But holding that it was not possible for the Court to go behind the decree and in view of an order passed by his predecessor which had held the decree to be executable, the learned District Judge allowed the first defendant's application for the grant of rateable distribution. The plaintiff, that is, the decree-holder in O.S. No. 79 of 1931, not being satisfied with the order, brought the suit out of which the present appeal arises, for a sum of Rs. 2,886-9-10 to which he alleged he was entitled in excess of what he had already got by way of rateable distribution. To this suit, the other decree-holders who had received their shares in the rateable distribution (defendants 3 to 16) were also impleaded.

It was contended on behalf of the plaintiff that the first defendant was not entitled to rateable distribution (*a*) as the decree in O. S. No. 8 of 1932 was not a decree for money and was not executable and, (*b*) that even if that decree could be regarded to be one for the payment of money, it ceased to bear that character after the first defendant had succeeded in getting a charge declared in O. S. No. 57 of 1934.

These allegations were controverted on behalf of the first defendant. The lower Courts came to the decision that the decree in O. S. No. 8 of 1932 was a decree for the payment of money and the first defendant was entitled to rateable

1. (1936) 71 M.L.J. 87 : I.L.R. 59 Mad. 751.

distribution. The suit having been thus dismissed by both the Courts, the plaintiff has preferred this second appeal.

From what has been stated, it would be obvious that two main questions have to be determined in this appeal. They are (*a*) whether the decree passed in O. S. No. 8 of 1932 was one for payment of money and executable and (*b*) if so, what was the effect of the decree passed in O. S. No. 57 of 1934.

It has been held in a number of decisions (*Ranganatha Thathachariar* v. *Krishnaswami Thathachariar*[1], *Abdul Hakim Baig* v. *Mohammad Burramiddin*[2], *Vedantam Ramacharyulu* v. *Kasturi Narasimha Suryanarayana*[3], *Bava C. Vaithilinga Mudaliar* v. *The Board of Control, Sri Thyagarajaswami Devasthanam, Tiruvarur*[4], *T. G. Krishnamurthi* v. *Vedantam Seetharamanujacharyulu*[5] and *V. E. N. K. R. M. A. Ramanathan Chettiar* v. *The Madura Sri Meenakshi Sundareswarar Devasthnam*[6]) to most of which Venkatasubba Rao, J., was a party, that the provisions of a decree in a scheme suit would be inexecutable if they formed a part and parcel of the permanent scheme of administration and were not "intended to be given effect to independent of the constitution framed by and embodied in the decree" even if they happened to be directory in their nature. At the same time it was pointed out that they would be executable even if they happened "to stray into the wording of the scheme if they were intended to be immediately executable for the purpose of introducing the scheme or otherwise." The distinction has been very clearly brought out in the case of *Bava C. Vaithilinga Mudaliar* v. *The Board of Control, Sri Thyagarajaswami Devasthanam, Tiruvarur*,[1] where Venkatasubba Rao, J., observed as follows :

> "The true distinction is, not whether a provision in a scheme decree is directory or declaratory, but whether the provision sought to be executed is or is not in what is really the scheme part of the decree."

I have therefore to see whether the provision in the decree which has been held by the lower Courts to be executable does or does not form "the scheme part of the decree." I cannot get rid of the decisions which have been cited before me in the way in which the learned District Judge seems to have got over the decision in *Vaithilinga's case*[4] in execution proceedings. The present plaintiff was no party to the order passed by his prececessor and there was no question of the Court being called upon to go "behind a specific recital in the decree" when the contention advanced before him, as admitted by the learned District Judge in his order of the 26th January, 1937, was that the recital embodied in the decree was not enough to make it executable. The very first thing that strikes the eye in reading Ex. B is that although there is a definite direction in clause 4 "that the trustee do realise the trust properties" there is nothing in that provision which entitles the trustee to realise the properties *from the defendants*. Clause 4 of the decree may be, in that respect, compared with clauses 5 and 6 where the defendants 2 and 3 were ordered to pay the costs or to deliver the utensils to the plaintiffs or to the trustee. As observed by Venkatasubba Rao, J., in *Ranganatha Thathachariar* v. *Krishnaswami Thathachariar*[1], "In a suit for money the decree directs payment of it by the defendant to the plaintiff." But there is nothing in this decree which empowers the decree-holder to realise the money from Nalam Subrahmanyam's heirs. The omission appears to have been deliberate and not accidental. Nalam Subrahmanyam died during the pendency of that suit and even if defendants 2 and 3 (his minor son and widow) were added as legal representatives of the deceased trustee, they could not be held to be trustees themselves and were really strangers to the trust. One must not, in considering these cases, fail to notice the distinction (which Odgers, J., failed to draw in *Balakrishna Chettiar* v. *Krishnamurthi Ayyar*[7] between a trustee who was ordered to render an account in the Allahabad case and any other defendant who was not a trustee) whether the direction in the decree was being given against a trustee or against a stranger to the trust, who had to be impleaded because his presence was

1. (1923) I.L.R. 47 Mad. 139 at 146.
2. (1925) I.L.R. 49 Mad. 580.
3. (1933) M.W.N. 183.
4. (1936) 71 M.L.J. 87 : I.L.R. 59 Mad. 751.
5. (1936) 45 L.W. 230.
6. (1937) 2 M.L.J. 887.
7. (1926) 52 M.L.J. 182 at 184.

necessary for a final adjudication of the question relating to the existence of the trust or to the nature of the property. Learned counsel for the respondents complained to me that the contention as to the omission of any reference to the defendants from clause 4 of the decree was a new one and should not be allowed to be raised at this stage. I do not agree as the point that the decree was not for the payment of money and was inexecutable has been specifically raised throughout. The pleadings could not have been argumentative and it was not necessary for the plaintiff to state the grounds or reasons in support of that contention in his plaint. When I expressed my opinion on that objection, he suggested that I might look through the judgment on which the decree (Ex. B) was based and requested me not to pronounce my judgment until he had been able to get a copy of the same from his clients. As no objection was raised to this course by the other side, I agreed to do so. A copy of the judgment was produced in Court on Friday last and I have looked into it. But on going through the same, I do not find that the judgment in any way helps the respondents. The portion of the judgment on which clause 4 of the decree is based is identical in terms with what is found in the decree. No decree was passed against the defendants 2 and 3 in spite of the fact that they were found to be in possession of the assets and accounts belonging to Subrahmanyam.

I have thus to see whether in view of the legal position that has been stated in the various cases to which reference has already been made this direction in regard to the realisation of the trust properties was one forming part of the scheme of management or was independent of the same. That it does form part of the actual scheme (*vide* paragraph 4 of the same) admits of no doubt. But it may be that that direction has, in the words of Reilly, J., erroneously strayed into the scheme and this is what is being contended by Mr. Ramachandra Rao. He would want me to take out the words 'he shall take possession of the same through Court if necessary in execution of this decree' from paragraph 4 of the scheme and attach them to clause 4 of the decree. This cannot be done as in my opinion the realisation of the trust properties on which the whole scheme depended was an essential part of the same and could not be taken out of it. The words in clause 4 of the decree (Ex. B) are words vesting the property of the trust in the trustee appointed under clause 2 of the decree and cannot be construed, so as to be directory. The vesting of the trust property in the trustee cannot but be regarded to form "a part and parcel of the permanent scheme of administration" and cannot be found to have strayed into the wording of the scheme erroneously. It is only in pursuance of the scheme and in accordance with the vesting order passed by the Court and embodied in the decree that the trustee can be said to have been entitled to recover it for and with the object of carrying out the object of the trust. To say that the realisation of the trust property, on which the foundation of the scheme rests was outside its pale and could not be said to relate to the permanent arrangements or permanent scheme of administration, as remarked by the learned District Judge is incorrect in my opinion. Moreover, the decree was not really for the payment of money by the defendants. I must therefore hold that the decree Ex. B was not for the payment of money and was not executable. The application therefore for rateable distribution under section 73 (2) was not competent.

As to the second question. The first defendant was not content with the decree passed by the District Judge in the scheme suit. It was in all probability realised that the decree was not passed against the defendants and could not therefore be executed against them. That is how the first clause in the decree Ex. A can be explained. If the decree amount was realisable from the assets of the late Nalam Subrahmanyam in the hands of the first defendant, the first provision in the decree Ex. A would have been useless. It was also realised that in view of Nalam Subrahmanyam having died with a large number of debts, the trust may not be able to satisfy itself, at any rate fully from out of his property if it did not get a charge declared in its favour. That is why a separate suit was brought for that purpose. The second provision in the decree creates "a charge for the recovery of the money decreed in clause 1 *supra*" "over all the properties proved to have been acquired by the late Nalam Subrahmanyam after the 11th June, 1924." But in view of my

decision on the first question that the decree in O. S. No. 8 of 1932 was not for money and was inexecutable it is unnecessary for me to decide as to the effect of the decree in O. S. No. 57 of 1934. That question would have arisen for consideration if the first contention advanced on behalf of the plaintiff would have been decided against him.

For the above reasons, the appeal must be accepted, the order of dismissal of the suit by both the Courts set aside and a decree for Rs. 2,886-9-10 and interest at 6 per cent. per annum from the date of the suit up to the date of its realisation passed in favour of the plaintiff against the first defendant. The plaintiff will have his costs throughout from out of the estate vesting in the first defendant.

A verbal application was made at the hearing on behalf of the creditors who were impleaded in this case as parties and who did not choose to bring a suit under section 73, Civil Procedure Code, praying for a decree to be passed in their favour also if I came to the conclusion that the judgments of the lower Courts were incorrect and could not be sustained. Reference was made in this connection to the very wide powers conferred on a Court of Appeal under Order 41, rule 33, Civil Procedure Code. But they cannot possibly help the other defendants in this case. If they were dissatisfied with the decision of the executing Court passed in January, 1937, they should have instituted a suit against the first defendant within the period of limitation prescribed for such suits. They failed so to do. It is impossible to grant a relief to them in this case, as it would affect a vested right which has come into existence by virtue of the law of limitation. They should have brought suits themselves if they felt aggrieved by the order of the executing Court. I am dealing in this case with a suit for a specific sum of money brought by a person who had felt aggrieved by that order. And in dealing with an appeal from a decree passed in that suit, it is impossible for me to grant decrees in favour of all the defendants who were hit by the order of the execution Court simply because they were parties to this action and in supporting the plaintiff's claim had asked for decrees for their rateable shares passed in their favour. No court-fee was paid by them in respect of their demands and no appeal or even cross-objections were preferred or filed by them in the lower appellate Court when the plaintiff's suit was dismissed. The fact is that these defendants were merely formal parties to the present action and have continuously regarded themselves to be so. I cannot therefore accede to their prayer.

Leave refused.

K.C. *Appeal allowed.*

[PRIVY COUNCIL.]

(On Appeal from the High Court of Oudh.)

PRESENT :—LORDS MACMILLAN, WRIGHT AND PORTER, SIR GEORGE RANKIN AND SIR MADHAVAN NAIR.

Babu Raja Mohan Manucha and others .. *Appellants**

v.

Babu Manzoor Ahmad Khan and others .. *Respondents.*

Contract Act (IX of 1872), section 65—Execution sale under Schedule III, para. 11 of the Civil Procedure Code—Mortgage by judgment-debtor of property sold, before execution sale was set aside under Order 21, rule 89 of the Code—Invalidity of mortgage—Right of mortgagee to recover under section 65 of the Contract Act, the money lent—Restitution—Limitation—Election.

The principle underlying section 65 of the Contract Act is that a right to restitution may arise out of the failure of a contract though the right be not itself a matter of contractual obligation. The incapacity imposed on a judgment-debtor by para. 11 of Schedule III of the Civil Procedure Code, is an incapacity to affect his property and not a general incapacity to contract and it follows that though a mortgage by such a judgment-debtor after an execution sale by the Collector and before its being set aside under Order 21, rule 89 of the Civil Procedure Code, is invalid, the covenant to repay is not made void by the mere operation of para. 11 of Schedule III of the Code. But the lender who has agreed to make a loan upon security and has paid the money is not obliged to continue the loan as an unsecured advance and he may avoid the contract and bring himself within the terms of section 65 and within the principle of restitution.

---

*P. C. A. No. 68 of 1939. 14th December, 1942.

Where the security was not discovered to be void until after the suit on the mortgage was instituted no question of limitation can arise under section 65 of the Contract Act since the circumstances giving rise to the right to rescind did not come to the plaintiff's knowledge until after action brought. It would be unreasonable in such a case to regard the plaintiff as having affirmed the contract of loan as subsisting so as to bar his claim, under section 65 of the Contract Act, on the ground of any omission to repudiate within a reasonable time.

A defendant who when sued for money lent pleads that the contract was void can hardly regard with surprise a demand that he should restore what he received thereunder though the alternative claim was not originally put forward in the plaint and in such cases an unduly rigid view towards the question of pleading should not prevent restitution being ordered.

Ronald F. Roxburgh and *L. M. Jopling* for Appellants.

Respondents *ex parte.*

Their Lordships' Judgment was delivered by

SIR GEORGE RANKIN.—This is an appeal by the plaintiffs in a suit to enforce a registered mortgage dated 12th August, 1919, whereby a village called Mahona Poorab in the District of Sultanpur in Oudh was made security for the sum of Rs. 10,000 with interest at 9 per cent., with half-yearly rests. The grantor of the mortgage was Iltifat Ahmad Khan, the defendant's father, and the grantee was the plaintiffs' father Moti Lal Manucha. The deed contained a personal covenant to pay the interest half-yearly and to repay the principal at the end of three years. The suit was brought in the Subordinate Judge's Court at Sultanpur on 9th August, 1934, by which time both of the original parties to the deed had died. The plaint sought relief, both by sale of the mortgaged property and by enforcement of the covenant. The defendants by their written statement of 30th November, 1934, maintained among other defences that the mortgage sued upon was void, having been made in circumstances which brought into operation para. 11 of Schedule 3, Civil Procedure Code :

"11. (1) So long as the Collector can exercise or perform in respect of the judgment-debtor's immovable property, or any part thereof, any of the powers or duties conferred or imposed on him by paras. 1 to 10, the judgment-debtor or his representative in interest shall be incompetent to mortgage, charge, lease or alienate such property or part except with the written permission of the Collector . . . ."

The learned trial Judge sustained this contention. He refused the plaintiffs a money decree upon the covenant on the ground that this cause of action had become barred by limitation. By his decree of 2nd August, 1935, he dismissed the suit with costs. An appeal by the plaintiffs to the Chief Court was dismissed on 5th May, 1937, the learned Judges (Thomas and Zia-ul-Hasan, JJ.) agreeing with the trial Court on both of the grounds of his decision. They were asked to give the plaintiffs relief under section 65, Contract Act:

"65. When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it."

But the Chief Court refused to entertain this ground of claim because it had not been pleaded and was not taken in the memorandum of appeal. Accordingly, they left the plaintiffs to seek this remedy by a separate suit. The plaintiffs have appealed to His Majesty in Council. By their petition of appeal under Order 45, rules 2 and 3 and by their case, they contest the findings of the Courts in India both as regards the invalidity of the mortgage and as to their claim on the personal covenant being statute barred : they also insist upon their right to relief under section 65, Contract Act. The defendants have not lodged a case nor have they appeared at the hearing : their Lordships are indebted to learned counsel for the appellants who laid fully and candidly before the Board the matters for consideration on this appeal.

The first question is whether para. 11 of schedule 3 applied to render Iltifat Ahmad Khan incompetent on 12th August, 1919, to mortgage Mahona Poorab. He was one of the six sons of a deceased taluqdar of Mahona named Ewaz Ali Khan who had mortgaged to the Allahabad Bank in 1908 the whole taluka consisting of 26 villages, and had in 1909 executed deeds of gift transferring six of these villages to his wife and certain of his sons. Mahona Poorab was given to his son Iltifat, Gadaryadih to his wife Safuran Bibi and Deokali to Bashir Ahmad Khan, another of his sons. The Bank had on 12th April, 1915, obtained a preliminary decree for

sale upon its mortgage, in a suit (No. 76 of 1914) wherein the donees under the deeds of gift had been impleaded as persons interested in the equity of redemption. That decree was made absolute on 17th June, 1916, by which time Ewaz Ali had died and had been succeeded as taluqdar by his son Yar Muhammad. On 3rd February, 1917, the Subordinate Judge had transferred the decree for execution to the Collector under section 68 of the Code. On Yar Muhammad's application a sum of Rs. 1,50,000 was with the Collector's permission raised by mortgage of the taluqa in January, 1919, leaving some Rs. 77,000 outstanding. On 15th February, 1919, the Collector ordered the sale of the six villages which had been transferred by Ewaz Ali to his wife and sons. Both Iltifat and Safuran Bibi applied for leave to mortgage their respective villages but this was refused; and, on 14th June, 1919, it was ordered that a sale should be held on 21st July; that the village Gadaryadih should be sold as the first lot and the village Mahona Poorab as the second lot, and that the other villages should only be sold if these two had not produced sufficient to discharge the debt. "As soon as by the last bid the full amount of demand is secured the auction will be closed."

On 18th July, Iltifat made an application for leave to mortgage Mahona Poorab and another village so as to avoid a sale of the former; but this application was adjourned until the day of sale (21st July), and, on that date was disallowed together with a similar application by Safuran Bibi. At the sale on 21st July, the terms of the order of 14th June were departed from: village Deokali was first sold for Rs. 45,000 and Gadaryadih next for Rs. 60,000. The order of 21st July recording the sale stated that "as the amount due to the decree-holder was satisfied so the remaining four villages were discharged from sale." The Nazir was directed to take one-fourth of the sale price (plus commission) from the auction purchasers, who were to deposit the remaining three-fourths within 15 days—that is, by 5th August, 1919. The date on which the balance was in fact paid by the auction purchasers is not proved but it may well have been paid within the time limited. On 16th August a petition by Safuran Bibi and Bashir-ud-din was filed purporting to be under rule 89 of Order 21 of the Code which is in the same terms as rule 996 of the rules made by the Government of the United Provinces under section 70 of the Code. It asked that the sale of the villages Gadaryadih and Deokali be set aside on the petitioners bringing into Court Rs. 95,250 being an amount sufficient to satisfy the decree and to provide the necessary solatium of five per cent. to the auction purchasers for the loss of their bargain. By order dated 10th September, 1919, this application was allowed and the sale was cancelled. This order fixed the exact sums to be returned to the disappointed purchasers; noted that a question remained to be decided by the Civil Court as to the exact amount of interest due to the decree-holder; and stated that the money in Court would be paid out in full or in part according to the Civil Court's decision. By the same order the papers were directed to be returned to the Subordinate Judge's Court. The execution case in that Court (No. 110 of 1916) continued until 31st May, 1920, the dispute as to the exact balance if any payable to Yar Muhammad out of the money in Court having been determined on 8th May, 1920.

Now, the crucial date for the purposes of this appeal is 12th August, 1919, when the mortgage in suit was executed by Iltifat. That deed recited the proceedings in execution of the Bank's decree and the sale of the villages Gadaryadih and Deokali: it stated that the sum of Rs. 10,000 was being borrowed by Iltifat from Moti Lal Manucha because Iltifat had to pay a proportionate share of the decretal amount. It has been suggested in argument that the money thus obtained may have been needed to make up the sum brought into Court on 16th August in order to set aside the sale. Whether this be so or not, the mortgage was in itself an open, honest and reasonable transaction. The parties and their advisers would appear to have known of the provisions of para. 11 of schedule 3 and it is quite probable, so far as their Lordships can judge, that they thought that the Collector's duties had come to an end as regards Mahona Poorab, or that by the sale on 21st July of the two other villages it had been exonerated under the order of the Collector from all claim in the execution proceedings.

Argument on these lines has been addressed to the Board, as it was to the Courts in India, and their Lordships have given it the careful consideration which it deserves. They are not however of opinion that on 12th August, 1919, the Collector could no longer exercise or perform in respect of Mahona Poorab any of his powers or duties under paras. 1 to 10 of schedule 3, and they are not of opinion that any written permission of the Collector has been shown. On the first point, under rules 996 to 1000 (which correspond to Order 21, rules 89 to 94 of the Code) time has to be allowed after the sale for applications to set it aside, either (as in the present case) by way of allowing to the judgment-debtor a last chance to save his property or by reason of irregularity or fraud in the conduct of the sale. Not until this time has expired—it is 30 days from the date of sale under article 166, Limitation Act, 1908—can an order be made confirming the sale even if no application be made to set it aside : the sale only becomes absolute when the Collector confirms it (rule 998, Order 21, rule 92) : and it then becomes the Collector's duty to issue the sale certificate which is the purchaser's document of title (rule 1000, Order 21, rule 94). These duties and powers of the Collector all arise to him in the case of a mortgage decree out of paras. 1 and 10 of schedule 3 to the Code which authorise him to sell the property in whole or in part and in one or more lots. Under para. 9 he has other duties in addition, for example, as to holding the sale proceeds at the disposal of the Civil Court which has ordered execution. As is shown by the terms of section 70 of the Code and by their subject-matter, the rules which have been referred to are made for regulating the procedure of the Collector and his subordinates and for investing them with the necessary powers to carry out a judicial sale. They are not extraneous to his duty to conduct the sale.

In these circumstances, it is impossible to hold that the time referred to in para. 11 had expired on 12th August, 1919. It lasted until 10th September, 1919, at least, and as the relevant date in this case is 12th August, it is not necessary to say when the period ended. These conclusions are in accordance with a previous decision of the Board arising out of the same execution sale where the relevant date was 14th August, 1919 : *Nisar Ahmad Khan* v. *Raja Mohan Manucha*[1]. The claim to have had the Collector's written permission for the mortgage of 12th August, 1919, rests on the terms of the order of 21st July, 1919, recording the sale of that date. It had been directed by order of 14th June that so soon as the full amount of the demand had been secured, the auction should be closed; and a recital, as part of the sale proceedings that when a sufficient sum had been bid for the two villages sold first (Deokali and Gadaryadih), "the remaining four villages were discharged from sale" means only that they were not put up for sale. At that time it still remained to be seen whether the auction purchasers would deposit three-fourths of the purchase price within 15 days ; other contingencies lay still further ahead.

For these reasons there is no escape from the conclusion that on 12th August, 1919, Iltifat was, in terms of para. 11, "incompetent to mortgage" Mahona Poorab. It becomes necessary to consider the effect of this conclusion upon the rights of the parties.

In *Nisar Ahmad Khan* v. *Raja Mohan Manucha*[1] already cited it was held by the Chief Court of Oudh and by the Board that the disability imposed by para. 11 affected the judgment-debtor's right to deal with his immovable property or part thereof, but did not take away his personal liability to repay the loan. In that case, two mortgages were held to have been obtained by undue influence, and one of these—namely, Ex. 5, dated 14th August, 1919—was also held to have been granted in violation of para. 11. The borrower's liability to repay the sum lent upon this latter mortgage remained notwithstanding its invalidity as a charge ; but judgment had been given in the Chief Court, not for the full contractual sum, but in view of the finding of undue influence upon the footing of a refund with simple interest at 6 per cent., under section 65, Contract Act. This was also treated as a term which equity would impose as a condition of setting aside a transaction on the

1. (1940) L.R. 67 I.A. 431 : I.L.R. (1940) Kar. 419 (P.C.).

ground of undue influence. The claim upon the covenant to repay was not barred by limitation, and there was no occasion to consider whether the lender, finding that he had no security, could repudiate or rescind the contract of loan and demand his money back; or whether if he did not do so he could claim both upon the covenant to repay and also under section 65 as if these were co-existing or cumulative rights. When the Board negatived the defence of undue influence it gave decree upon the basis of the borrower's contractual liability to repay the loan with interest at 8 per cent. with half-yearly rests.

The decision in *Nisar Ahmad Khan* v. *Raja Mohan Manucha*[1] was given by the Board in July, 1940, after the present case had been decided by the Chief Court. As this appeal must to some extent be governed by the Board's previous decision Mr. Roxburgh, for the appellants, guided himself by it in presenting his argument. While insisting upon the validity of the charge created by the deed of 12th August, 1919, over Mahona Poorab, he abandoned his claim under the personal covenant, and asked that if his security be held invalid he should be given relief under section 65, Contract Act. A formal minute has been tendered to that effect by direction of the Board. Their Lordships, being of opinion, for the reasons already stated, that the security is invalid, have now only to consider whether there is upon that footing any sufficient reason why the estate of the deceased mortgagor should not be ordered to restore the money received under the transaction of 12th August, 1914. Endeavouring to give full consideration to all objections which would appear to be open to the absent respondents, their Lordships are of opinion that the course taken by learned counsel for the appellants showed a proper appreciation of the difficulty of insisting on the personal covenant and put the right of his clients to relief upon a safer ground. The principle underlying section 65 is that a right to restitution may arise out of the failure of a contract though the right be not itself a matter of contractual obligation. If it be settled law that the incapacity imposed on a judgment-debtor by para. 11 of schedule 3 is an incapacity to affect his property and not a general incapacity to contract, it follows that the covenant to repay is not made void by the mere operation of the paragraph. But the lender who has agreed to make a loan upon security and has paid the money, is not obliged to continue the loan as an unsecured advance. The bottom has fallen out of the contract and he may avoid it. If he does so avoid the contract, he brings himself within the terms of section 65 and within the principle of restitution of which it is an expression—whether for all purposes adequate or exhaustive need not here be considered. In the present case, the loan was not to be repayable until after three years. It can hardly be thought that if the invalidity of the security had been established at the end of six months, the lender would have been obliged to allow his money to remain outstanding without security for the whole three years. Ordinarily, if the invalidity of the security is not suspected until after the time for repayment has arrived, the lender will have nothing to gain and something to lose by repudiating the contract at that stage. But that will not always be his position. In India the bar of limitation for a suit to enforce the security is imposed at the end of twelve years, and for a suit on the personal covenant at the end of six years. Not uncommonly it happens that a mortgagee relying upon ample security has incautiously allowed his claim on the covenant to become time-barred. That may or may not be the appellant's position: the Courts in India have thought it was. But while the appellant's lack of precaution would not increase their rights, it would not take away from them their right, if they think it to their advantage to refuse to be bound by the contract of loan when the basis of the contract has gone. They can refuse to be bound by the contract and rely upon the right to recover their money which arises to them, not under any contract, but as a matter of restitution by reason that no contract subsists. Unless and until they do so, however, they can have no right to recover on the footing of section 65. They cannot have at one and the same time a right to insist that they have a valid subsisting special contract governing the transaction of loan and entitling them to a specific rate of interest and a right to say that their money was advanced under a void agreement.

1. (1940) L.R. 67 I.A. 431 : I.L.R. (1940) Kar. 419 (P.C.).

On this view, two matters require consideration by way of defence. Can it be said that the claim under section 65 is barred by limitation, or that the appellants having adhered to the contract cannot now claim to repudiate? And if neither of these defences can be made out, ought the appellants to be refused restitution in this suit by reason that section 65 was not pleaded as a separate ground of claim in the plaint? In *Mt. Bassu Kuer* v. *Dhum Singh*[1], it had been held in a specific performance suit brought by the vendor that a sale deed was ineffectual there being certain unwritten terms which occasioned dispute, and the Board considered that the deed was " discovered to be void " at the date of the decree declaring it to be so. In *Harnath Kuer* v. *Indar Bahadur Singh*[2], a Hindu during the lives of the widows of a deceased taluqdar in Oudh sold his rights as prospective reversioner to certain villages of the taluqa in which he had no more than an expectancy. The Board took the view that there were materials from which it might fairly be inferred in the peculiar circumstances of the case that there was a misapprehension as to his private rights and that the true nature of those rights was not discovered till his demand for possession was resisted. In *Annada Mohan Roy* v. *Gour Mohan Mullick*[3], however, the appellant had abandoned in the High Court his right to contend that an agreement was discovered to be void at a date later than the date at which it was entered into. The agreement was for the sale of the rights of certain persons as prospective reversioners to the estate of a deceased Hindu who was survived by two widows. The Board in refusing to reopen the question, noticed that in *Harnath Kuer* v. *Indar Bahadur Singh*[2] there were special circumstances and said that

"there has been no suggestion anywhere in the course of the present proceedings that any such facts occurred as could alter the view which must normally be taken of the meaning of the word 'discovery' and of the time at which that discovery must be held to have occurred."

In *Hansraj Gupta* v. *Official Liquidators, Dehra Dun, Mussoori Electric Tramway Co.*[4], it was said :

" In the absence of special circumstances (and none exist here) the time at which an agreement is discovered to be void within the meaning of section 65 is the date of the agreement."

and *Annada Mohan Roy* v. *Gour Mohan Mullick*[3] was cited as authority. But in *Nisar Ahmad Khan* v. *Raja Mohan Manucha*[5], which arose out of the same execution proceedings as the present case and upon very similar facts, section 65, Contract Act, was referred to and the Chief Court's view was approved, that the mortgage was not " discovered to be void " at the time it was entered into. The Chief Court's view had been that the mortgage was not discovered to be void until the trial Judge held it to be so or at the earliest until a plea to that effect was taken in the suit. Their Lordships have already expressed in this judgment their view that the transaction in question in the present case was an open and honest transaction and think that its invalidity was at the time obscured by the difficulty in applying para. 11 of schedule 3 correctly to the particular facts of the execution proceeding and to the terms of the orders as recorded. For ten years, payments of interest were made and received thereunder. In these circumstances they are of opinion that in the special circumstances of the case the security of 12th August, 1919, was not discovered to be void until after the present suit was instituted on 7th August, 1934. On this view no question of limitation can arise under section 65 since the circumstances giving rise to their right to rescind did not come to the plaintiffs' knowledge until after action brought. Again, their Lordships think that it would be unreasonable in this case to regard the appellants as having affirmed the contract of loan as subsisting, by reason of any arguments addressed to the Courts in India hypothetically, or by way of alternative to their main contention, which has throughout been that the transaction of 12th August, 1919, is not hit by the provisions of para. 11. Neither Court in India gave the

1. (1889) L.R. 15 I. A. 211 at 218 : I.L.R. 11 All. 47 (P. C.).
2. (1922) 44 M.L.J. 489 : L.R. 50 I.A. 69 : I.L.R. 45 All. 179 (P. C.).
3. (1923) 45 M.L.J. 617 : L. R. 50 I. A. 239 at 244 : I.L.R. 50 Cal. 929 (P. C.).
4. (1933) 64 M.L.J. 403 : L. R. 60 I. A. 13 at 24 : I.L.R. 54 All. 1067 (P.C.).
5. (1940) L. R. 67 I. A. 431 : I.L.R. (1940) Kar. 419 (P. C.)

appellants a decree upon the personal covenant and the Chief Court would not permit section 65 to be entertained as a basis for relief. In the circumstances, it cannot be said that there has been an omission to repudiate within a reasonable time which evidences an election to affirm the personal covenant or that the appellants have by their acts and conduct treated the contract as subsisting after the facts grounding the right to rescind came to their knowledge. "Election to affirm must, if to be gathered from action, be gathered from unequivocal acts" (per Lord Dunedin in *Abram Steamship Co.* v. *Westville Shipping Co.*[1]).

With all due respect to the Chief Court, their Lordships think that their attitude towards the question of pleading was unduly rigid. A defendant who when sued for money lent pleads that the contract was void can hardly regard with surprise a demand that he restore what he received thereunder. What defence the respondents can have desired to make on this aspect of the case is not revealed by anything in the judgment of the Chief Court, apart from the question of limitation with which their Lordships have already dealt and from the contention that section 65 cannot apply where there is a transfer of property and not a mere agreement. This last contention is a pure point of law and one which the Chief Court rightly regarded as without substance and contrary to authority. There is no reason to apprehend that by allowing the appellants to obtain relief under section 65 any injustice to the respondents can result. On the contrary, *prima facie* it is hardly just that the rights of the parties in respect of the transaction of 12th August, 1919, should be dealt with in part and in part postponed. Though a matter of discretion a result so inconvenient needs to be justified by solid reason and their Lordships see no sufficient reason to prevent restitution being ordered in this case.

Their Lordships are of opinion that this appeal should be allowed; that the decrees of 2nd August, 1935, and 5th May, 1937, passed by the trial Court and by the Chief Court respectively should be set aside; and that the plaintiffs-appellants should have a decree for payment out of the property of Iltifat Ahmad Khan deceased of Rs. 10,000 with simple interest at 6 per cent. per annum from 12th August, 1919, until the date of the Order in Council to be made on this appeal provided always that the defendants respondents shall be entitled to set off all payments made by the said Iltifat Ahmad Khan deceased or by themselves in respect of the advance mentioned in the plaint as on the dates when such payments were made: the Chief Court to take or cause to be taken any account which may be necessary to ascertain the sum payable under the direction hereinbefore given; and the total sum so payable to carry interest from the date of the said Order in Council at 6 per cent. per annum until payment. Their Lordships will humbly advise His Majesty accordingly. The respondents must pay the appellants' costs of this appeal but each party will bear its own costs in the Courts in India.

Solicitors for Appellants: *Hy. S. L. Polak & Co.*

Respondents *ex parte.*

K.S. *Appeal allowed.*

[PRIVY COUNCIL.]

(On Appeal from the High Court of Calcutta.)

PRESENT:—LORD THANKERTON, SIR GEORGE RANKIN AND SIR MADHAVAN NAIR.

Ram Lal Dutt Sarkar .. *Appellant**

v.

Dhirendra Nath Roy and others .. *Respondents.*

Landlord and tenant—Lump sum rent—Failure of landlord to give possession of portion of the demised land—English doctrine of suspension of rent—Applicability.

In a suit for three years' rent of a permanent tenure which had been granted by the predecessors of the plaintiffs to the predecessors of the appellant, it was contended by the appellant that part of the lands comprised in the patta were demised at a lump sum rent and as the plaintiffs or their pre-

1. (1923) A.C. 773 at 779.

* P. C. App. No. 51 of 1941. 15th December, 1942.

decessors had dispossessed the appellant's predecessors of a portion of those lands he was entitled to a suspension of the entire rent until the lands in question were restored to him. It was found however on the evidence that possession of the portion was never given to the lessee and was not insisted on by him.

Held, that the English doctrine of suspension of rent should not be applied in Bengal.

Held, further, that whether it should be applied at all to cases of eviction of the lessee by the lessor from a part of the land, and if so, whether it is limited to rents reserved as a lump sum, and whether it is a rigid or discretionary rule, are questions which will call for careful review when they are presented by the facts of a particular case.

W. Wallach for Appellant.

Respondents *ex parte*.

Their Lordships' Judgment was delivered by

SIR GEORGE RANKIN.—This appeal is brought by special leave from a decree dated 29th March, 1938, passed by the High Court at Calcutta on second appeal. The respondents have not appeared before the Board and Mr. Wallach for the appellant has carefully discharged his duty to see that all relevant matters are placed before their Lordships. The decree under appeal reversed the decrees of the Additional District Judge and Subordinate Judge at Faridpur dated respectively 17th April, 1935 and 6th February, 1933.

The suit was begun on 15th April, 1931. It was a suit for three years' rent of a permanent tenure which had been granted by the predecessors of the plaintiffs and of certain *pro forma* defendants to one Srinath Sarkar by a patta dated 8th July, 1875, and for which a kabuliyat had been executed by Srinath on 22nd May, 1877. He was engaged on zemindari management in the service of the plaintiffs' predecessors who granted him the patta. He died childless in 1890 and his widow Patambari Dassee succeeded him as tenure-holder. She died on 3rd March, 1930, whereupon the appellant and his two brothers succeeded as her husband's reversioners. They were not originally made parties to the suit but were added on their own application. The appellant has since acquired his brothers' interests. His defence to the suit is that part of the lands comprised in the patta of 1875 were demised at a lump sum rent, and that, as the plaintiffs or their predecessors some time in the 'eighties of last century dispossessed Srinath of a portion of these lands measuring some 37 acres and worth about Rs. 56 per annum, no part of that rent is payable by him : his right being to a suspension of the entire rent until the lands in question are restored to him. The trial Court and the lower appellate Court sustained his defence and dismissed the claim for rent. The High Court on second appeal remanded the case for calculation of the proper abatement of rent to be allowed to the appellant. His main grievance is that the learned Judges of the High Court have contrary to sections 100 and 101, Civil Procedure Code, set aside the lower appellate Court's finding of fact that the plaintiffs' predecessors gave possession of the 37 acres to Srinath and thereafter dispossessed him.

The grantors of the tenure were certain persons called Rai—members of a family who owned the zemindari of a place in Jessore district called Narail and who are referred to as the Narail Babus. Of these certain members owning a one-sixth interest were not parties to the patta of 1875 but the other members demised thereby the remaining five-sixths share in a mouza called Orakandi said to have an area of 1,464 bighas after deduction of certain revenue-free lands and village pathways. For 822 bighas then in the occupation of raiyats the rent reserved was Rs. 957-14-8. For a further 4 bighas 13 cottahs—a small cultivated area held in khas—the rent was to be Rs. 4-11-0 at Re. 1 per bigha. For a further area of 635 bighas which included patit or waste land rent was fixed at Rs. 317-15-9, but it was to remain rasad (in abeyance) ; payment being made at Re. 1 per bigha for such area as was found to be tilled in 1876 and at eight annas for the further areas found tilled in later years. The claim for rent in the present suit does not include any of this rasad rent but is for Rs. 770-1-4 the plaintiffs' proportion of the sum of Rs. 962-9-8—that is 957-14-8 plus 4-11-0—together with certain cesses. The sum of Rs. 962-9-8 is called in the patta the talabi jama or demandable rent. As to Rs. 957-14-8 it appears to their Lordships to be a lump sum rent in respect of a five-sixths share in 822 bighas 19 cottahs 6 chittahs,

In 1906 or 1907, in the course of the survey and settlement then being carried out the lands of khatians 1 to 17 inclusive were entered as in the occupation of raiyats paying rent to the Narail Babus, including the plaintiffs. Of these the lands of eight khatians—3, 4, 6, 11, 13, 14, 15 and 17—are claimed by the appellant to be part of the 822 bighas which were settled at a lump sum rent. These lands amount in area to some 37 acres and their rentals to about Rs. 56. Much time was devoted at the trial to the plaintiffs' contention that these lands are not part of the 822 bighas but lands belonging to Ratnadanga Bil and Patiladanga Bil—marshy areas which according to the plaintiffs were outside the mouza of Orakandi referred to in the patta of 1875. A further contention of the plaintiffs was that some lands held by tenants under them were chhit or detached lands of another mouza called Aruakandi. But it has been held by the trial Court and by the lower appellate Court that mouza Orakandi included these two bils and that the 37 acres now in question were part of the raiyat area of 1875 (1282 B. S.)—part that is of the 822 bighas which bore the lump sum rent of Rs. 957-14-8. This must now be accepted.

The trial Judge found that the raiyats on these lands had been paying rent to the plaintiffs since at least 1293 B.S. or 1886 A.D. But since the plaintiffs produced no papers to show that they had collected these rents between 1875 and 1886 he concluded that Srinath had been given possession and then ousted. He stressed for this purpose a passage in the kabulyat executed by Srinath in 1877 wherein Srinath on the recital that he had applied for settlement of the mouza Orakandi and that for 1,464 bighas a sum of Rs. 1,280 had been fixed as jama—divided into Rs. 317 rasad and 962-9-8 demandable—says :

"I, on taking a settlement and receiving a patta which was executed on 25th Ashar 1282 B. S. and was registered on 28th September, 1875, am in possession in mofussil."

The learned Additional District Judge expresses agreement with the trial Court in several passages of his judgment which are concerned with the question whether the 37 acres now in question were part of the original area of 822 acres mentioned in the patta. He agrees that they did not fall outside Orakandi and he rejects the theory of chhits of Aruakandi. He says :

"The learned lower Court discussed the entire evidence as well as the kabuliyats with due care. I agree with his view that the lease comprised 5/6th of the mouza Orakandi (save the rent-free, etc.) that is of the whole block composed of Orakandi, Ratandanga beel and Patildanga beel. Patambari was in possession of the whole of the block, except the scattered parcels. The theory of chitta lands has been fully discussed by the learned lower Court. I do not think it necessary to repeat the reasonings given by the lower Court in its judgment regarding this theory. It is unnecessary to discuss further. I have carefully considered the entire evidence on the record and I agree with the views taken by the lower Court regarding khatians Nos. 1-17 and I hold that the lands of these khatians are covered by the kabuliat Ex. O (1) executed by Srinath Sarkar in 1284 B.S. (=1877-78), and that the plaintiffs dispossessed the defendants and their predecessors of those lands. The appeal of the plaintiffs therefore fails. Issue 2 is decided accordingly against plaintiffs."

Issue 2 was in these terms :

"Was there dispossession of any portion of the tenancy by the landlords? Are the landlords in possession of any portion of the tenure? If so, whether there should be a suspension or abatement of rent?"

Ghose, J., in the High Court says :

"It has been found by both the Courts below that the landlords did not make over possession of the whole of the demised land to the lessees but kept a portion to themselves . . . . These lands were part of the mouza which was leased to Srinath Sarkar but they were not made over to Srinath. Srinath however paid the rent without any objection for the dispossession of a part."

Again.

"We find that here there was in effect no dispossession but an original failure of making over possession and this failure was acquiesced in for 55 years by the original lessee and his widow. . ."

Bartley, J., held that the doctrine of suspension of rent "cannot be applied rigidly in this country and that it should properly be regarded as a rule of justice, equity and good conscience." A main difficulty in the case is to ascertain with what degree of accuracy the word "dispossession" is employed. Strictly used, it could only apply to Srinath himself. It is no one's case that his widow or reversioners were ever in possession of these 37 acres. Since findings of fact by the lower appellate Court are to be treated as final they should at least be clear and specific—not ambi-

guous or inferential. A general approval given to the views of the trial Court will not necessarily incorporate all its findings in detail—especially if accompanied by language which casts doubt on a particular point. Ghose, J., seems to have misinterpreted the findings of the trial Court and thus disabled himself from appreciating correctly the findings of the lower appellate Court. But their Lordships are not prepared to hold that the High Court was obliged to consider that the Additional District Judge had found as a fact that Srinath had been put into possession and then ousted. If the learned Additional District Judge had dealt with the question specifically, examining the contents of the kabuliyats from this particular angle no ambiguity could well have arisen. But the specific expression of his finding is "that the plaintiffs dispossessed the defendants and their predecessors of those lands." This is a singularly unconvincing way of stating a finding that Srinath was put in possession and was dispossessed but a phrase natural enough if all that be meant is that the defendants and their predecessors were kept out of possession. The reference to issue 2 only increases the uncertainty ; and while there are indications in other parts of the judgment that the learned Judge may have agreed that Srinath was dispossessed in the strictest sense of the term their Lordships see no such statement as can be taken to remove the ambiguity in the crucial passage. If it is in law of importance to the rights of the parties to decide whether the defendants have proved that Srinath was ever in possession of the 37 acres their Lordships think that the High Court was entitled to decide that question upon the evidence before it. The documents, the oral evidence and the view taken of them by the trial Judge are made clear in his able judgment. The exhibited kabulyats of 1883-4 and 1890-1 and the mention made of these eight tenancies in the plaintiffs' books of 1886 led him to conclude that

> " these eight raiyats were holding these lands at the date of the lease of 1875. But no papers have been produced to show that the landlords never gave up collecting these rents and did so between 1282 (1875-6) to 1293 (1886-7), so that my conclusion in view of the admission of possession in the kabulyat [that is, of 1284 (1877-8)] is that the landlords dispossessed the lessee from his share in these lands, and kept his widow Patambari out of possession of it and are in possession of it to this day."

Their Lordships think that the High Court was right in not accepting this result as proved by the evidence. The recital of possession in the kabulyat of 1877 is in the vaguest and most general terms and if taken correctly refers not only to the raiyati area but to the whole area of 1,464 bighas which included a large quantity of waste lands including watery waste of the two bils. As the burden of proving eviction by the Narail Babus is heavy on the appellant it seems unreasonable to hold that the defendants' predecessor was in receipt of rent from the eight tenancies merely because at this distance of time the plaintiffs have not proved that they continued to collect it—it being plain that in 1886 they were treating the tenancies as old ones. The purport and effect of the 1883 kabulyat, Ex. 4 (2), is that the jama was not a new one but the old jama recorded in the name of Bhuban Mohan Mandal mudafat Dilaram Nai. The recital in Ex. 4 (1890) of the auction purchase of 1885 is of a tenancy standing in the name of the judgment-debtor mudafat Mujumdar Bairagi. So too with the kabulyat of 1891 Ex. 4 (4). These kabulyats may not truly represent the facts but what they purport to show is not that an old tenancy had come to end in 1875 or 1877, that rent had been paid to a new landlord, and that now the tenants were to begin to hold anew from the Narail Babus but that the old tenancy had continued. There is indeed no solid ground for holding that Srinath ever realised rent from these eight holdings. While no explanation is made out for his not having possession of khatians 1 to 17—about 43 acres in all—weight must be given to the fact that there is no trace of complaint by Srinath and that the whole rent demandable under the patta of 1875 was paid by him until his death in 1890 and by his widow till 1930. He was in the service of the Narail Babus till his death as manager of one pargannah and apparently deputy manager at their headquarters. This case must, their Lordships think, be regarded as one in which possession of the 37 acres was not given to the lessee and was not insisted on by him.

The next question is whether after more than 50 years it is open to the appellant on these facts to claim that no part of the rent of Rs. 957-14-8 is payable until the

lands of the eight khatians are restored. Bartley, J., appears to have thought that it had become impossible for the plaintiffs to restore these lands but this is not a matter which has been proved or enquired into. It is not clear that it would *prima facie* be a proper matter for inquiry. It may or may not be that the effect of the lower appellate Court's decision is to give the appellant some 785 acres free of rent in perpetuity. Not long after the High Court had taken the place of the Sudder Dewani Adalat it is found applying to agrarian tenancies in Bengal principles applicable by the English common law to lands let at an entire rent—broadly speaking, that an eviction of the tenant from a part of the lands by title paramount gives rise to an apportionment, but eviction by the landlord from a part entails a suspension of the entire rent. Sir Barnes Peacock's judgment in *Gopanund Jha* v. *Lalla Gobind Pershad*[1] began this line of decisions with a quotation from the article Rent in Bacon's Abridgment—doubtless the 7th edition of 1832. The case was apparently one of eviction of the lessee from a part of the land demised by title paramount but the lessor had also taken the ryots' rents for two years claiming that the lease was not binding. So far as the meagre report shows, the law as to eviction from a part by the lessor was not in point. But, thereafter, such English decisions as *Morrison* v. *Chadwick*[2] and *Upton* v. *Townend*[3] came to be followed in Bengal from time to time and there has been considerable repetition of doctrine to the effect that the rent issues out of every parcel of the land demised and that a landlord cannot apportion his own wrong. The English case-law is to be seen in full flood in such cases as *Dhunput Singh* v. *Mahomed Kasim Ispahain*[4] and *Harro Kumari Chowdhrani* v. *Turna Chandra Sarbogya*[5]—both cases of eviction by the lessor and the latter a case where the rent reserved was at a certain rate per bigha. "Eviction" has been extended to include receipt of rent by the lessor from an undertenant—notwithstanding that payment to the lessor is no defence whatever to the latter against a claim for rent by the lessee. The necessity of suspension has also been affirmed, following *Neale* v. *Mackenzie*[6], *Holgate* v. *Kay*[7], *Watson* v. *Wand*[8] and other English decisions, when the lessee has been unable owing to the lessor's default to obtain possession of some part of the premises demised. So far the only rule laid down by the Board has been the negative proposition that

> "the doctrine of suspension of payment of rent, where the tenant has not been put in possession of part of the subject leased, has been applied where the rent was a lump rent for the whole land leased treated as an indivisible subject. It has no application to a case where the stipulated rent is so much per acre or bigha." (*Katyayani Debi* v. *Udoy Kumar Das*[9].)

The applicability of the English rules was strongly challenged in the Tagore lectures of 1895 : (*see* Land Law of Bengal by Saroda Charan Mitra, a Judge of the High Court, from 1904-1908) and at the present time decisions in Bengal disclose a state of considerable perplexity and difference of opinion as to the application of these doctrines : some distinguishing between cases of eviction and cases of failure to deliver possession : some expressing the view that though it must work injustice in some cases the refusal to permit apportionment of rent helps to protect tenants and should be maintained as a dependable rule : others holding with Bartley, J., in the present case that no such rigid rule can be applied as justice, equity and good conscience in the conditions of Bengal. It will suffice here to refer to *Dwijendra Nath* v. *Aftabuddi Sardar*[10], *Mahim Chandra* v. *Karamali*[11], *Abhoya Charan Sen* v. *Hem Chandra Pal*[12], *Sakhisona Dasi* v. *Prankrishna Das*[13] and *Jagadish Nath Roy Bahadur* v. *Surendra Prosad Lahiri*[14]. The observations of the Board in *Katyayani Debi* v. *Udoy Kumar Das*[9] have only added to the perplexity since they have in some cases been wrongly taken to lay down that if the rent is a lump sum rent then in all cases of failure to give possession of any part there must be a suspension of the entire

1. (1869) 12 W.R. 109.
2. (1849) 7 C.B. 266 : 137 E.R. 107.
3. (1855) 17 C.B. 30 : 104 R.R. 562.
4. (1896) I.L.R. 24 Cal. 296.
5. (1900) I.L.R. 28 Cal. 188.
6. (1836) 1 M. & W. 747 : 150 E.R. 635.
7. (1844) 1 Car. & Kir. 341 : 174 E.R. 838.
8. (1853) 8 Ex. 335 : 155 E.R. 1375.
9. (1924) L.R. 52 I.A. 160 at 166 : I. L. R. 52 Cal. 417 (P.C.).
10. (1916) 21 C.W.N. 492.
11. (1928) 33 C.W.N. 501.
12. (1929) I.L.R. 57 Cal. 137.
13. (1933) 37 C.W.N. 301.
14. (1935) 40 C.W.N. 166.

rent. They were intended only as showing that on its facts that case raised no question of suspension even if the course of discussions in Bengal be taken as correct, a question upon which there was no need to embark.

For all purposes of this appeal, the rent in the present case was a lump sum and the lessors failed to give possession to the lessee of the 37 acres. The Board is therefore—for the first time as it would seem—required to consider whether in such a case suspension of the entire rent must *prima facie* ensue, or whether it is discretionary, or whether there is no such rule applicable to cases of failure to deliver possession. Since 1772 no Court has had authority to apply to the districts of Bengal rules devised upon other principles than justice, equity and good conscience. The doctrine of suspension of rent is not the less to be regarded because it has been drawn from the common law, but this origin will not serve by itself for a justification. In 1869, when Sir Barnes Peacock in *Gopanund Jha* v. *Lalla Gobind Pershad*[1], cited Bacon's Abridgment (*sub voce* Rent) he was citing an authority which showed how the doctrine that an entire rent could ever be apportioned had been admitted only with great difficulty. That it could not be apportioned after a severance of the reversion was seen in 1832 to be a conception "too narrow and absurd to govern men's property long," but it was considered as settled, though not until after some hesitation, that if eviction from any part had been effected by the lessor apportionment should be refused ; though if it had been by title paramount the entirety of the rent would present no obstacle to apportionment. The reason given is

"that no man may be encouraged to injure or disturb his tenant in his possession, whom by the policy of the feudal law he ought to protect and defend."

Technical distinctions between forms of action—between the action for rent brought against the lessee on his personal covenant and an action against an assignee of the term brought in debt or upon a "contract real" (cf. *Stevenson* v. *Lambard*[2]) have never been noticed in Bengal. As a matter of broad general principle, the law of India no longer proceeds upon the notion that where a contract is for an entire sum there is a necessity of reason which prevents a party from recovering anything where his full obligations under a special contract have not been discharged. Since 1872, under section 70, Contract Act, the mere fact that the party has done work which has been accepted, or supplied goods which have been taken, entitles him to compensation subject if need be to any claim for damages. It is not supposed that a contrary rule is needed to encourage people to keep their bargains. No one objects that the work done or goods supplied cannot of themselves raise an equity in favour of one who has broken his contract.

If then the matter is in a sense one of policy and of general policy, it must be noted that tenancies in Bengal are of different kinds but in very many cases are permanent and at fixed rates (mourasi mukarari or istemrari). Not infrequently they cover large tracts including jungle, watery wastes, char lands, lands which have become silted up, lands which have been washed away by rivers and reformed. The effect of the rains upon rivers and the boundaries of estates, the absence of boundary marks and pillars, the difficulty of relaying maps upon the site, the scarcity of reliable old maps and the recent origin of survey and settlement operations—these too are matters which give a special edge of unreason to any general doctrine that suspension of the entire rent is the consequence of a failure to give possession of any part however small. At various times, before 1885, when the Bengal Tenancy Act was passed, the raiyat was doubtless in very special need of the protection of the law, but this can hardly be thought to apply to the modern tenure-holder as a class and relief by specific performance, by damages, by abatement of rent is not unobtainable from the Courts and need not be inadequate.

In these circumstances, their Lordships think it impossible to require the Courts in Bengal as a matter of justice, equity and good conscience to follow such English cases as *Neale* v. *Mackenzie*[3]. The English context of English decisions must be borne in mind—the social system, the character of the countryside, the well-

1. (1869) 12 W.R. 109.
2. (1802) 2 East 575 : 102 E.R. 490.
3. (1836) 1 M. & W. 747 : 150 E. R. 635.

settled boundaries, the limited term of leases. It is not matter for surprise that learned Judges in Bengal have from time to time rejected the doctrine that suspension of rent should follow from a failure to deliver possession of any part of the land demised. Their Lordships are not of opinion that this can be justified as a "dependable rule" to be adhered to notwithstanding hard cases. Where the failure to give possession of a part is due to defect in the lessor's title it seems almost absurd that the rule should be any different from that which applies to eviction by title paramount. Nor do their Lordships think that the rule of suspension should be retained for cases in which the lessor does not show that he was unable to give possession of the part withheld. The purely accidental or aleatory character of the penalty with which the lessor is visited prevents it from being the medium or the object of a judicial discretion in such cases; which afford no reason why a scientific and careful attempt to adjust the rights of the parties should discard the ordinary forms of relief—damages, apportionment, specific performance, the right to avoid the lease as the case may require—for a method which proceeds by giving one party to the transaction a windfall, or a right to retain and use another party's property without making payment therefor. Moreover, the right of a tenant to obtain possession of all that has been demised arises at the commencement of the lease and any legal theory which permits such claim to be raised after 50 years as a claim to pay no rent at all stands condemned.

As the case before the Board has been held to be a case not of eviction by the lessors but of their failure to give possession, their Lordships in this *ex parte* appeal confine themselves to the law applicable to the latter class of cases. To that class they think that the doctrine of suspension of rent should not be applied in Bengal. Whether it should be applied at all to cases of eviction of the lessee by the lessor from a part of the land, and if so, whether it is limited to rents reserved as a lump sum, and whether it is a rigid or discretionary rule—these questions will call for careful review when they are presented by the facts of a particular case. Their Lordships must guard themselves from being supposed to assume that had Srinath been ousted from any portion of the lands in 1886 it would be open to his successors to set up for the first time in 1931 that the entire rent must be suspended. They will humbly advise His Majesty that this appeal should be dismissed. There will be no order as to the costs of the appeal.

Solicitors for Appellant : *Hy. S. L. Polak & Co.*

Respondents *ex parte.*

K.S. ——— *Appeal dismissed.*

[END OF VOLUME, 1943—I.]

GENERAL INDEX.

ACKNOWLEDGMENT of debt by natural father or mother of minor given away in adoption—If can bind minor ... 85

ADVERSE POSSESSION—Dedication of house to charity—Trustee in possession claiming as joint family property of himself and son—Possession adversely to trust for over twelve years—Effect—Charity's title extinguished to the extent of one half ... 358

———Invalid dedication to charity in a will—Executor holding property for over 12 years on behalf of charity—Possession adverse to true owner whose title will be extinguished under section 28 of the Limitation Act—Section 10, Limitation Act, not applicable (P.C.) ... 11

ARMY ACT (VIII OF 1911), S. 123 (1)—Person suspected of being deserter—Procedure for arresting ... 59

CIVIL PROCEDURE CODE (V OF 1908), S. 11—*Res judicata* between co-defendants... 36

———S. 21—Contract—Offer sent by post—Place of acceptance material—Suit for breach of contract—Whether can be filed at place of offer ... 353

———S. 47—Applicability—Dispute between co-decree-holders—Judgment-debtor not interested therein—Appeal—Maintainability ... 271

———S. 47—Execution petition filed a few days before decree became barred—Dismissal of petition for failure to file sale papers, etc.—Order appealable ... 174

———Ss. 50, 52 and 53—Trespass committed—Suit against father—Decree passed—Partition effected before decree—Subsequent death of father—Property allotted to sons whether can be proceeded against ... 268

———S. 55 (4)—Surety bond for prosecution of petition for adjudication and presence when required—Surety not liable for anything outside the terms of the bond ... 162

———S. 60 (1) (*b*)—Cooking vessels with which a hotel-keeper prepares sweetmeats—If tools of an artisan exempt from attachment... 414

———S. 73 and O. 21, r. 82—Scope ... 57

———S. 73 (2)—Scheme suit—Decree for recovery of money by new trustee against estate of old trustee—Other creditors of the estate of the old trustee—Rateable distribution—Whether the right to recover the money under the scheme is executable ... 504

———S. 80—Suit against the Crown under O. 21, r. 63 to set aside order of Court dismissing plaintiff's claim—No fresh notice under S. 80 necessary ... 251

———S. 80—Suits under S. 14 of Madras Survey and Boundaries Act—Two months' notice under S. 80 of the Civil Procedure Code—Necessity ... 53

———S. 92—Suit by general trustees of a temple against the trustees of a fund contributed by devotees for accounts and recovery of amounts to be ascertained on such accounts—Does not require the sanction of the Advocate-General or its institution (F.B.) ... 388

CIV. PRO. CODE (V OF 1908)—*Contd.*

———S. 110—Leave to appeal to Privy Council—Substantial question of law—Nature of—Refusal to grant leave ... 375

———S. 115—Scope ... 168

———S. 115—Village Panchayat Court's *ex parte* decree—Application to set aside decree after more than 3 years—District Munsiff's decision based not on the record before him but on his own supposition of what the cases should be—Irregularity in exercising jurisdiction attracting interference in revision ... 318

———S. 145—Application independently of S. 145 by surety for cancellation of his bond on the ground that it had become discharged by happening of subsequent events—Court to which bond was executed has jurisdiction to decide. 114

———O. 1, r. 8—Suit by residents of one village against those of another—Claim for payment of debt due by residents of latter village—Representative suit—Maintainability—Permission not granted before publication in Gazette—One of several defendants dropping out—Surviving parties consenting to decree—Binding nature ... 453

———O. 9, r. 9 and O. 43—Dismissal of application to set aside order of dismissal for default, of rent suits—Appealability ... 80

———O. 13, r. 1—Small cause suit—"First hearing" for filing documents—What is ... 41

———O. 21, r. 4—Decree of High Court—Decree for Rs. 5,000 whether executable by Presidency Small Causes Court—Madras High Court Original Side Rules, O. 19, r. 30—If abrogates Civil Procedure Code, O. 21, r. 4. 49

———O. 21, r. 22 (as amended in Madras in 1936)—Scope and applicability ... 149

———O. 21, r. 57 (as amended)—Attachment before judgment of properties lying in two distinct jurisdictions—Default of decree-holder in execution application relating to one set of properties—Dismissal by Court—Order of dismissal affecting only property lying within jurisdiction of such Court ... 225

———O. 21, r. 63—Attachment of property by decree-holder—Obstruction on ground of adverse possession—Declaratory suit permissible—Limitation—Suit arresting running of time .. 212

———O. 21, r. 82 and S. 73—Scope ... 57

———O. 21, rr. 84 and 85—Decree-holder auction-purchaser—If bound to pay within 15 days from date of sale the amount payable rateably to other creditors out of the sale proceeds ... 62

———O. 21, r. 90—Insolvency—Interim receiver appointed—Before date of appointment execution sale of debtor's property—Application by the receiver to set aside sale—Whether he had the right in the circumstances—Whether he was a person whose interests were affected by sale—Meaning of sale—Whether it had reference to confirmation of sale ... 449

CIV. PRO. CODE (V OF 1908)—*Contd.*

———O. 21, r. 90—Sale in execution without applying Madras Act IV of 1938—If material irregularity ... 137

———O. 33, r. 11 (as amended)—Unsuccessful suit in *forma pauperis* —Court-fees—Cannot be ordered to be paid by defendant even if his interests were same as those of the plaintiff ... 286

———O. 33, r. 15—Non-compliance with—Effect—Plaint filed with insufficient court-fee—Cost paid at later stage—Deficiency in court-fee made good later—Bar of limitation on later date—Dismissal of suit ... 427

———O. 34, r. 5—Final mortgage decree passed during pendency of appeal against preliminary decree—No amendment of final decree after passing of appellate decree—Appellate decree when executable ... 198

———O. 34, r. 12—Preliminary decree—Form—Consent of prior mortgagee to a decree for sale of property by puisne mortgagee—Decree whether in order ... 169

———O. 34, r. 14 (1)—Prohibition under—Mortgagee decree-holder purchasing some items of hypotheca in revenue sale—Effect ... 477

———O. 38—Arrest before judgment—Debtor finding surety under O. 38, r. 2—Surety obtaining discharge after passing of decree under r. 3—Necessity to call upon defendant to find fresh surety—Proper procedure ... 87

———O. 41, rr. 20 and 22—Memorandum of cross-objections—Party not impleaded in appeal—Procedure for filing objections against—Time limit ... 429

———O. 43—Dismissal of application to set aside order of dismissal for default of rent suits—Appealability ... 80

———O. 43, r. 1, cls. (*c*), (*d*) and (*f*)—Application to set aside dismissal for default—Dismissal of application itself for default—Appeal against order—Whether lies ... 289

COMPANIES ACT (VII OF 1913), S. 87 (2)—Failure to report particulars of change in other directorships held by company's directors—Company liable even if it has no knowledge of change ... 119

———S. 109 (1) (*e*)—Promissory notes in favour of banking company endorsed to a creditor as security for its indebtedness to him—Absence of registration under section 109 (1) (*e*)—Effect—Contract Act (IX of 1872), Ss. 172 and 148 ... 142

CONTRACT—Building contract—Tenders for construction of buildings by company—Acceptance of tender—Entire contract—Meaning of—Offer if general—Tender for construction using granite jelly—Subsequent scheme to use limestone jelly—Fresh proposal by company to contract with fresh terms—Effect to materially alter the original contract—Refusal of contractor to accept the new terms—Company carrying on construction through other contractors—If breach of contract—Power to deviate by way of addition or deduction—Effect of—Clause that if company do not require the whole or portion of the contract to be carried out, the contract could be determined—If authorises company to terminate the contract and give it to another ... 303

CONTRACT ACT (IX OF 1872), Ss. 23 and 25—Promissory note in consideration of past illicit co-habitation—Enforceability ... 56

CONTRACT ACT (IX OF 1872)—*Contd.*

———S. 25 (1)—Contract to provide maintenance for a distant relation—No consideration—Nor mention of natural love and affection—Whether enforceable ... 422

———S. 65—Execution sale under schedule III, para. 11 of the Civil Procedure Code—Mortgage by judgment-debtor of property sold, before execution sale was set aside under O. 21, r. 89 of the Code—Invalidity of mortgage—Right of mortgagee to recover under section 65 of the Contract Act, the money lent—Restitution—Limitation—Election (P.C.) ... 508

———S. 74—Clause in agreement for payment of double the amount payable in case of default by pattadar—Whether enforceable ... 297

———Ss. 148 and 172—Applicability ... 142

———S. 230 (3)—Unregistered union which cannot be sued—Contract by a member on behalf of—Liability of member who signed the contract—Other members cannot be sued ... 425

CO-OWNERS—Partition suit—Mutual rights and liabilities to be adjusted between the parties ... 100

COURT-FEES—Suit by junior member of *putravakasam tavazhi*—Allegation that earlier decree was obtained impleading a member who was not the real karnavan and never had power to manage—Plaintiff not bound to ask for cancellation of such decree or pay *ad valorem* court-fee on it ... 296

COURT-FEES ACT (VII of 1870, as amended), Ss. 7 (iv) (*c*) and 7 (iv-A)—Applicability—Suit to declare mortgage deed to be sham and for injunction—Consequential relief—Valuation of suit for court-fees and jurisdiction—Order returning plaint—Defendant not preferring appeal—Plaint presented to proper Court—Objection as to jurisdiction whether maintainable ... 316

———S. 7 (*v*) and (*x*) (*a*)—Contract of sale—Property subject to then sold in lieu of mortgage debt—Suit for specific performance—Mortgage debt liable to scaling down under Madras Act IV of 1938—Valuation for purposes of court-fee—Prayer for possession as against persons not parties to mortgage or contract of sale—Separate court-fee payable ... 82

CRIMINAL LAW AMENDMENT ACT (XX OF 1938), S. 7 (1)—Procedure—Sub-Inspector's report disclosing facts constituting only a particular offence—No jurisdiction to try accused for other offences ... 315

CRIMINAL PROCEDURE—Subordinate Court—Power to review its own judgment—Limits ... 277

CRIMINAL PROCEDURE CODE (V OF 1898), S. 4 (1) (*r*)—Pleader—Unauthorised person excluded by first part of definition—Cannot claim protection under second part—District Magistrate's administrative order directing certain unauthorised persons should not be allowed to practise in a Court—Not open to revision by High Court ... 382

———Ss. 54 (1), 56 and 80—Arrest of person suspected to be a deserter from army—Procedure—Production of warrant or written authority before arrest—Not essential—Rescue of deserter after arrest—Offence ... 59

———S. 106—Scope ... 264

———S. 107—Security proceedings—Trial

CRIMINAL PROCEDURE CODE (V OF 1898)—*Contd.*

for past offences—Concurrent proceeding—Evidence same in both—Whether admissible in spite of the two proceedings being entirely different in scope ... 246

———S. 133—Powers of Magistrate to abate nuisance—Not curtailed by powers conferred on local authorities to abate nuisances under S. 44 of the Madras Public Health Act and S. 195 of the Madras Local Boards Act ... 237

———Ss. 133 and 137 (3)—Magistrate if can modify provisional order made under S. 133 while making it absolute under S. 137 ... 165

———S. 145—Person re-entering into possession after expiry of period of *ex parte* order against him—If wrongful dispossession of person who obtained temporary possession under the *ex parte* order ... 259

———S. 148 (3)—Successor to Magistrate who passed a decision under Ss. 145 to 147 cannot pass orders as to costs under S. 148 (3) ... 319

———S. 195 (3)—Scope. *See* Madras Village Courts Act, S. 73 ... 233

———S. 235—Joint trial on three separate charges for offences committed in the same transaction—Plea of guilty to third charge—Trial on other charges not illegal ... 466

———S. 342—"Circumstance against him"—Forged document—Several persons tried together—Person's name appearing on document—No other evidence—Judge whether may question accused—Legality of conviction ... 255

———S. 346 (1)—Complaint to Magistrate having no jurisdiction—Should be returned to complainant for presentation to the Magistrate having jurisdiction and not forwarded to immediate superior under S. 346 (1) ... 467

———S. 349—Sub-Magistrate finding that accused ought to be dealt with in a manner beyond his own powers referring case to Joint Magistrate—Procedure to be followed by Joint Magistrate ... 248

———Ss. 349 (1) and 562—Relative scope ... 126

———S. 422—Appeal against conviction—Notice issued to complainant but not to Crown—Conviction set aside—Revision petition filed by complainant—Interference ... 351

———S. 422—Notice to complainant—Salutary practice—Appeal against order convicting accused allowed without opportunity to complainant being given—Acquittal whether to be interfered with on that ground ... 493

———S. 423 (1)—Appeal—Records of trial Court destroyed by fire and copies not available—Proper procedure is to order a re-trial ... 129

———Ss. 476-B and 556—Complaint under S. 476-B—Dismissal of appeal against it by District Judge—District Judge if precluded from trying the case on the complaint ... 482

———S. 488—Claim for maintenance by a woman and son—Validity of marriage questioned in civil suit also—Propriety of allowing maintenance to son ... 485

———S. 488—Expenses of medical attention for an invalid wife—If within the word "maintenance" ... 230

———S. 488—Minor in custody of mother—Father's right to custody—No ground for refusing maintenance ... 120

———Ss. 488 and 489—Order for maintenance

CRIMINAL PROCEDURE CODE (V OF 1898)—*Contd.*

of daughter—Marriage of daughter—If can be set up as "sufficient cause" for discontinuing payment in an application for enforcement of payment ... 179

———S. 514—Accused joining the army and going beyond jurisdiction—Liability of surety—Surety entitled to have opportunity for showing cause why penalty should not be paid but not to an adjournment for that purpose ... 446

———S. 522—Scope and applicability—"Criminal force"—Construction ... 160

———S. 562—Person over 21 years of age convicted under S.454, Indian Penal Code—Not to be released under S. 562, Criminal Procedure Code ... 481

———Ss. 562 and 349 (1)—Relative scope ... 126

CRIMINAL TRIAL—Charge to the jury—Benefit of doubt to be given to the accused mentioned in the beginning and not in the end—Not sufficient to affect verdict—Points regarding dacoity not clearly made out in charge—Effect ... 377

———Complaint that accused made false or frivolous charges by post—Jurisdiction to entertain would be at place where letter was received and opened and not where it was posted .. 409

———Conviction for sale of kerosene above the price fixed before the date of amendment making it offence—Revisability ... 468

CUSTOM—Nattukottai Chettiars—Adoption—Secular motives as predominant—Death of widow—Adoption to deceased male by another member of family—Validity ... 195

DEFENCE OF INDIA ACT (1939), S. 2 (3)—Power to make penal provisions exclusively vests in the Central Government and not delegated to Province or its officers ... 99

———rr. 38 (5) and 34 (6) (*e*) and (*k*)—Pamphlet prejudicial to prosecution of war—Moderate language—Accused to be given benefit of doubt in the circumstances ... 416

———r. 81 (4) (before its amendment on 18th July, 1942)—Contravention of Collector's order fixing price of articles under the rule—Not punishable under r. 81 (4) ... 20

———r. 81 (4) (before its amendment on 18th July, 1942)—Price fixed by Collector—Sale at higher price—No provision for punishment ... 99

———r. 81 (4)—Price of copra not controlled by Government, but fixed by Local Prices Advisory Committee—Selling article at a price exceeding it—Conviction for, illegal ... 22 (1)

DIVORCE ACT (IV OF 1869), S. 7—Order for security for costs—When can be passed—English practice—Applicability in India ... 360

EVIDENCE ACT (I OF 1872), S. 115—Sale by ostensible owner—Estoppel against real owner ... 219

———S. 124—Public document—Communication by Tahsildar to Collector—Decision of Court that it is a public document—Discretion of officer not to reveal it to the public not to be questioned ... 154

———Ss. 159 and 160—Shorthand writer stating that transcript filed was a correct statement of a speech by the accused—Sufficiency to prove the speech complained of as prejudicial under the Defence of India Rules ... 343

GOVERNMENT OF INDIA ACT (1935), S. 205—Question raised whether Act IV of 1938 was *ultra vires* the Provincial Legislature in so far as it affected Negotiable Instruments—Question in the form not raised in appeal in High Court—Certificate when could be granted ... 314

GUARDIAN AND WARD—Hindu minor—Covenant entered into by guardian to pay maintenance to minor's grandmother—Arrears of maintenance—Decree for can be passed against the estate of the minor ... 339

HINDU LAW—Adoption—Death of widow—Adoption to deceased male by another member of family—Validity under custom among Nattukottai Chettiars—Secular motives predominant ... 195

———Conversion of father to Christianity—Effect on joint family—Division in status—Re-union with minor son not possible ... 257

———Debts—Pious obligation of son—Limits of liability—Immoral debt—Knowledge of creditor if need be proved—Borrowing for providing for needs of concubine—Not binding on son ... 104

———Debts—Suit against father and son—Limitation—Exclusion of time under S. 78 of the Provincial Insolvency Act by reason of pendency of insolvency proceedings against father—Suit against the son also not barred. 285

———Joint family—Nucleus—Business of co-parcener—Whether joint or separate property—Presumption and onus of proof (P.C.) ... 70

———Minor given in adoption—Promissory note or acknowledgment of debt by natural father or mother—If can bind the minor ... 85

———Religious endowment—Jain monastic order—Member living life of house-holder—Acquisition and enjoyment of property—Succession—Right of institution—Recital in sale deed—Meaning of word "gaddi" (P.C.) ... 208

———Succession—Bandhus—Tests of heritability—Dr. Sarvadhikari's line theory rejected—Sister's son's daughter's son excludes maternal uncle's son's son (F.B.) ... 364

———Widow's rights under the Hindu Women's Rights to Property Act (XVIII of 1937)—Maintenance in lieu of that portion of property consisting of agricultural property can be claimed ... 235

HINDU LAW OF INHERITANCE (AMENDMENT) ACT (II OF 1929), S. 2—"Sister"—Includes half-sister by the same father (F.B.) .. 1

———S. 2—"Sister" and "sister's son"—Whether include half-sister and half-sister's son—Rules of Mitakshara—Guidance from—Half-sister when entitled to succeed—Full-sister and half-sister if would take together—Half-sister's son and father's uncle's son—Preferential right—Scope and applicability of Act (P.C.) ... 180

INCOME-TAX ACT (XI OF 1922), Ss. 2 (1) and 4 (3) (viii)—Wakf deriving income from agricultural land—Receipt by mutwalli of fixed monthly remuneration out of the income—Not agricultural income (P.C.) ... 494

———(as amended in 1939), S. 8, provisos 1 and 2—Scope and applicability ... 46

———S. 66 (3)—Lease entered into by a money-lending firm—Loss incurred by the firm in the sub-leases—Not to be included as business loss for purposes of income-tax ... 171

IRRIGATION RIGHTS—Dry lands in estate—Surplus water taken for irrigation—Right whether conferred by such user—Punja and nanja—Meaning and incidents ... 47

LAND—Superstructure—Ownership of land in one person—Moneys expended by another on superstructure—No definite agreement regarding rights of parties—Equity in favour of person expending on superstructure creating a charge on land for moneys expended ... 203

LAND ACQUISITION ACT (I OF 1894), Ss. 9 (2), 18, 19 and 25 (1)—Claim for compensation at a certain rate—Subsequent claim at lesser rate—Still later claim at old rate—Amendment of claim superfluous—Power in the Judge to grant or refuse ... 278

———S. 18—Duty of Collector—Validity of reference—Whether Court can question it—Notice to interested persons by Collector—Whether obligatory—Period of limitation for party to apply ... 66

LANDLORD AND TENANT—Lump sum rent—Failure of landlord to give possession of portion of the demised land—English doctrine of suspension of rent—Applicability (P.C.) ... 514

LEGAL PRACTITIONER—*Bona fide* claim to lien on papers for outstanding fees—No misconduct—Mother of minor employing advocate to act in her own suit as well as in suit filed on behalf of minor—No obligation on advocate to keep separate accounts (S.B.) ... 487

LEGAL PRACTITIONERS' ACT (XVIII OF 1879), S. 13 (*f*)—Duty of practitioner—Demonstration in Court by him punishable under Defence of India Rules—Interference with administration of justice—Liability to be dealt with under the Act (S.B.) ... 8

———S. 13 (*f*)—Offence involving conviction under rule 34 (6) (*c*) of Defence of India Rules—If misconduct (S.B.) ... 396

———S. 15—Dismissal by Subordinate Court of complaint of professional misconduct against a pleader—No power to award costs—High Court taking up the matter under S. 15 of the Legal Practitioners' Act—Power to order payment of costs (S.B.) ... 121

LETTERS PATENT (MADRAS), cl. 15—Undertaking not to alienate property in order to avoid an order for security for costs being made—Sale in breach of undertaking—If of criminal or civil nature—Appealability ... 400

LIMITATION ACT (IX OF 1908), S. 6 and Art. 125—Alienation by limited owner—Reversioner then alive being minor—Subsequently born nearer reversioners—Suit for declaring alienation not to be binding on reversion—Time limit—Extended period of limitation whether available ... 157

———S. 10—Applicability to resulting trust (P.C.) ... 11

———S. 14—Scope—Sub-mortgagee of 3 separate mortgages filing suit in Munsiff's Court claiming relief by sale of the properties—Return of plaint for presentation to Sub-Judge as value of the three mortgages exceeded pecuniary jurisdiction of Munsiff—Amendment of plaint abandoning relief by sale of properties under two of the mortgages and asking only for sale of mortgage right in them and re-presentation to

LIMITATION ACT (IX OF 1908)—*Contd.*

Munsiff—Twelve years from the date of the other mortgage elapsing before re-presentation—S. 14 of the Limitation Act—Applicability ... 362

———S. 14 (2)—Execution applications—Interval more than 3 years between—Insolvency proceedings started meanwhile—Delay due to defect of jurisdiction of Court—Computation of period of limitation—Applicability of S. 14. 323

———S. 19—Acknowledgment — Validity—Two mortgages—Insolvency of mortgagor—Sale of property by Official Receiver—Payment towards interest by purchaser's representative—Saving of limitation ... 135

———S. 28—Invalid dedication to charity—Property held for over 12 years on behalf of such charity—Extinction of title of owner (P.C.)... 11

———Art. 120—Application under S. 4, Provincial Insolvency Act, to set aside transfer—Limitation—Starting point ... 125

———Art. 123—" Payable or deliverable " —Commencement of limitation—Direction for payment of legacy free of subsisting mortgage—Discharge of mortgage as starting point ... 36

———Art. 125—Applicability ... 157

———Art. 137—Sale of property subject to lease—Lease to continue for two more years—Obstruction to delivery by tenant—Limitation runs only from the date when the lease expired ... 207

———Art. 182 (5)—Application for delivery of property sold in auction by mortgagee—Certain items sold first—Application for remaining items being sold—Limitation (F.B.) ... 9

———Art. 182 (5)—Application for execution returned for production of sale papers—Subsequent order of dismissal after refusing adjournment asked for by the decree-holder for production of sale papers—If " final order " ... 236

———Art. 182 (5)—Execution petition returned endorsed " Vakil has no power. Returned. Time 7 days "—Subsequent order rejecting application for non-compliance—If " final order" ... 445

———Art. 182 (5)—Step-in-aid of execution —Application for attachment—Final order recording petition—Fresh application for receiver —Dismissal—Claim subsequently upheld—Appeal—Whether can be treated as " step-in-aid" ... 95

LUNACY ACT (IV OF 1912), S. 67—Manager of lunatic's property appointed under—Not competent to sue for recovery of arrears of rent accrued subsequent to date of lunatic's death ...22 (2)

MADRAS AGENCY RULES, R. 54—Power of agent to review judgment ... 333

MADRAS AGRICULTURISTS' RELIEF ACT (IV OF 1938), S. 3 (ii), Proviso A—Division of joint Hindu family on 30th March, 1936 —Assessment of manager to income-tax for 1936-37 in ignorance of division—Divided member not disentitled to benefits of Act ... 211

———S. 3 (ii), Proviso D—Applicability to holder of estate in area transferred to Orissa Province paying peshkush ... 457

———S. 3 (ii), Proviso D—Co-owner—Share of liability to be taken into account ... 104

———S. 3 (ii), Proviso D—Mortgagors of part of village held in inam—Whether exempt from the benefits of Act IV of 1938 ... 90

MADRAS AGRICULTURISTS' RELIEF ACT (IV OF 1938)—*Contd.*

———S. 3 (ii), Proviso D—Payment of kattubadi by co-sharer—Mode of fixing amount—Amount due and payable to be taken into account ... 333

———Ss. 8 and 9—Mortgage debt—Security within British India and parties living outside —Applicability of Act ... 32

———Ss. 8 and 9, Proviso —Scope —Debt earlier than date of contract—Right of debtor to scaling down ... 231

———S. 8 (2) and (3)—Consolidation in 1926 of pre-existing debts and a fresh advance—Payments towards component debts before consolidation—Damdupat rule—Mode of applying. 321

———S. 8 (2) and (3)—Payments by agriculturists alone to be regarded in applying the section ... 137

———S. 8, Explanation—Splitting of pre-existing liability into parts and execution of new contracts with different terms—Not a " renewal" —Clause in mortgage giving mortgagee right to appropriate payments to interest—Open payments—Presumption of appropriation... 190

———S. 10 (2) (i)—Mortgage with possession with a counter part by mortgagee—Balance mentioning a rate of interest in calculating the *purappad*—If takes the transaction out of the scope of S. 10 (2) (i) ... 419

———S. 10 (2) (*iii*)—Liability to scheduled bank—Interest provided at less than nine per cent.—Renewal of previous debt carrying interest at higher rate—Application for scaling down—Sustainability ... 172

———S. 15—Application under—If subject to the time-limit specified in section 20 ... 45

———S. 15—Decree against original holder for arrears of rent—Original holding ceasing to exist and new holdings recognised by landlord in its stead—Payment of rent for faslis 1346 and 1347 not possible in respect of original holding—New holders cannot claim the wipping off of the arrears of rent ... 431

———S. 15—Decree for eviction and payment of arrears of rent—Provision for set off of arrears against compensation for improvements—Right of tenant to benefit under S. 15 of Act IV of 1938 in respect of the arrears of rent ... 164

———S. 15—Decree for mesne profits in ejectment suit in Civil Court—Not one for rent —Interest on arrears of rent—Is part of arrears of rent to be deposited under S. 15 of Act IV of 1938 ... 253

———S. 19—Appellate decree passed after coming into force of the Act—Procedure to be adopted ... 32

———Ss. 19 and 8—Person taking a mortgage of properties purchased by a puisne mortgagee in discharge of his mortgage after a mortgage decree had been passed in a suit by the first mortgagee—If a " judgment-debtor " entitled to apply for scaling down—Section 8 (2) and (3)—Payments by agriculturists alone to be regarded in applying the section ... 137

———S. 20—Time limit specified in—Not applicable to applications for relief under S. 15 of the Act ... 45

———S. 21—Declaration of dividend in insolvency of debtor—When complete 411

MADRAS AGRICULTURISTS' RELIEF ACT (IV OF 1938)—*Contd.*

———S. 24—Sale in execution set aside after decree-holder had drawn out the decree amount from Court—Respective rights of parties and the purchaser ... 34

MADRAS CITY MUNICIPAL ACT (IV OF 1919), S. 101, cl. (*a*)—Bhajana mandiram occasionally let out for small rent for performing marriages—Not exempt from property tax... 408

MADRAS CITY TENANTS PROTECTION ACT (III OF 1922)—Applicable to Mambalam ... 102

———S. 11—Notice to quit not containing offer to compensate tenant—No compliance with S. 11—Suit for ejectment not maintainable. 102

MADRAS CO-OPERATIVE SOCIETIES ACT (VI OF 1932), S. 51—Hindu joint family—Some members being members of Society—Application by non-members to set aside award and sale—Maintainability ... 287

MADRAS DEBT CONCILIATION ACT (XI OF 1936), Ss. 10 (2) (3), 19 and 25—Suit on mortgage—Application by debtor under S. 10 (1)—Creditor required to file statement—Non-compliance—Debt declared to be discharged—Application for revival—Dismissal—Suit on mortgage whether can be proceeded with ... 275

———S. 19—Debt contracted by a Hindu father for family necessity—Sons sued by creditor along with father—Section not a bar to such suit ... 410

———S. 25—Court ignorant of the existence of application for conciliation before the Board—If clothes it with jurisdiction in regard to subsequent proceedings ... 402

———S. 27—Time taken in obtaining certified copies of Board's orders excluded for purposes of limitation for suit—Computation—Copies sent by post under rule 22 of rules framed under section 29—Effect ... 151

MADRAS DISTRICT MUNICIPALITIES ACT (IV OF 1884), S. 147 and by-laws under Madras Act (V of 1920)—Water supply—Meter—If work necessary for such supplies—Cost of repair—Liability of house-owner ... 415

———(V of 1920), Ss. 81 and 83—Property tax levied—Gift of premises subsequently in the half year to educational institution—No right to claim refund of property tax ... 150

———S. 182—Prescriptive right acquired by owner to have projections over the street—Right of municipality to direct their removal—Liability to pay compensation ... 406

———S. 338—Licence subject to certain conditions—Non-compliance—Prosecution—Absence of notice to licencee—Effect ... 247

MADRAS DISTRICT POLICE ACT (III OF 1888), S. 53—Scope ... 447

MADRAS ESTATES LAND ACT (I OF 1908)—If continues in force in the areas transferred to the Province of Orissa from Madras Presidency ... 457

———S. 3 (2)—"Estate"—Meaning—Applicability to Madras Act IV of 1938, S. 3 (ii), Proviso D ... 90

———Ss. 111, 112, 115 and 116 (before amendment)—Onus of showing that an application was made within the 30 days prescribed by section 115—Sale held in the absence of such application—Suit by ryot for possession—Limitation Act

MADRAS ESTATES LAND ACT (I OF 1908)—*Contd.*

(IX of 1908), Art. 12 (*d*) or 14—Not applicable ... 386

———Ss. 111 and 112—"Rent"—Meaning—Lease of trees apart from land—Suit for recovery of amount due by lessee—Applicability of S. 111 ... 88

———S. 173—Suit under—Agreement between zamindar and ryots—Mamul wet localised and water rate fixed—Validity of agreement—Extra payment whether constitutes enhancement of rent—Failure to record same in record of rights—Suit to fix fair rent—Maintainability. 110

———Ss. 189 and 192 (as amended) — Scope and applicability ... 80

MADRAS GENERAL SALES TAX ACT (IX OF 1939)—Constitutional validity (F.C.) ... 345

MADRAS HIGH COURT FEES RULES, O. 4, r. 20 and O. 5, r. 3—Advocate's fee—Examination of witnesses on commission—Fee separately allowable —Extra work for working out mesne profits in the action—Fee allowable ... 252

MADRAS HIGH COURT ORIGINAL SIDE RULES, O. 19, r. 30—If abrogates Civil Procedure Code, O. 21, r. 4 ... 49

MADRAS HINDU RELIGIOUS ENDOWMENTS ACT (II OF 1927), Ss. 43 (1) and 73 (3)—Non-excepted temple—Archaka—Dismissal of, by trustee without a personal hearing—Confirmation of order of dismissal by Board—Suit in Civil Court against order—Suit whether barred—Flagrant violation of principles of natural justice justifies intervention of Civil Court ... 496

———Ss. 76 and 78—Public temple—Property claimed as private—Jurisdiction of Court to decide the ownership of the property ... 403

MADRAS IRRIGATION CESS ACT (VII OF 1865), S. 1, proviso 1—Stream directly fed by rains remaining dry for part of the year—If ceases to be a natural river—Connection of such stream with anicut constructed by Government—Water used for irrigation by riparian owner—Liability for water cess ... 347

MADRAS LOCAL BOARDS ACT (XIV OF 1920)—Prosecution for encroachment—Question of ownership though of civil nature should be decided by Magistrate—Circumstances favouring acquittal—Proper procedure ... 492

———S. 45-B—Scope—Debts of superseded Panchayat Board—Liability of Provincial Government not subject to possession of assets of the superseded Board ... 399

MADRAS PUBLIC HEALTH ACT (III OF 1939), S. 34—Easement right to allow water to run into neighbour's land—Water running from there into the public street—Liability ... 258

MADRAS SURVEY AND BOUNDARIES ACT, S. 14—Suit under—Two months' notice under S. 80, Civil Procedure Code—Necessity ... 53

MADRAS TENANCY ACT (XIV OF 1930), S. 3, cl. (x) —Ubhaya Pattom—Meaning ... 418

———S. 15 (3)—Sub-tenant cannot claim benefit of section ... 393

———Ss. 22, 24 and 25—Renewal of kanom—Material date—More than one renewal fee whether can be collected—Suit for redemption—Decree passed on condition of payment—

MADRAS TENANCY ACT (XIV OF 1930) —*Contd.*

Application for renewal of kanom—Decision in one—Effect in other proceeding—Question not specifically raised or decided—Bar of *res judicata* ... 325

———S. 25 (3)—Words " from the date of the termination of the previous kanom "—Meaning —Renewal of kanom ordered by Court—Term—Suit by jenmi for redemption and application for renewal before twelve years—Maintainability ... 328

MAHOMEDAN LAW—Widow—Right to retain possession of her husband's properties until her *mahr* is satisfied—Vendee under sale by widow to satisfy her *mahr* debt—Right to retain property—Limits ... 332

MADRAS VILLAGE COURTS ACT (I OF 1889), S. 73—Remedy under—Whether by way of appeal—Suit on promissory note in Village Court—Dismissal for absence of parties—Forged endorsement—Petition to District Court to make complaint—Dismissal—Propriety—Criminal Procedure Code (V of 1898), S. 195 (3) ... 233

MESNE PROFITS—Sale in execution set aside after decree-holder had drawn out the decree amount from Court—Re-delivery of property resisted—Right of judgment-debtor to mesne profits ... 34

MORTGAGE—Mortgagee decree-holder purchasing some items of mortgaged property in revenue sale—Effect ... 477

———Usufructuary mortgage—Provision that if mortgage is not redeemed within two years mortgagee should become absolute owner—Void —Limitation for redemption ... 155

MOTOR VEHICLES ACT (IV OF 1939), Ss. 42 (1) and 123—Bus carrying goods other than personal luggage in contravention of conditions in permit—Driver if liable ... 176

———Ss. 42 (1) and 123 (1)—Scope—Driver of bus carrying passengers in excess of the number specified in permit—Not liable if the bus carries a conductor ... 130

———S. 71 (2)—Speed limit prescribed by regional authority—Absence of publication in Gazette—Conviction for exceeding speed limit—Sustainability ... 153

———S. 71 (2)—Fixing of speed limit—Publication in District Gazette is not publication in Official Gazette ... 344

———S. 123 (1)—Liability of driver of bus for carrying passengers in excess of the number specified in the permit ... 130

MUNICIPALITY—Grant by Government—Only a bounty—Subsequent deductions—Recipient has no cause of action against Government for recovery of the deductions (P.C.) ... 423

NEGOTIABLE INSTRUMENTS ACT (XXVI OF 1881), S. 87—Signature of one of the executants of a promissory note forged by payee —Effect on liability of other executants—Absence of plea or argument as to applicability of S. 87—Duty of Court ... 380

ORDINANCE (NO. II OF 1942)—Conviction by Special Judge under the Ordinance—No appeal lies in the ordinary way ... 267

PARTITION SUIT—Co-owner's rights and liabilities to be adjusted in the suit itself. ... 100

PARTNERSHIP—Suit for accounts of dissolved partnership against managing partner—Liability for interest (P.C.) ... 16

PENAL CODE (XLV OF 1860), S. 75—Duty of Sessions Judge to refer to previous convictions of accused and include them in the charge under S. 75 and get the accused to plead to them ... 192

———S. 147—Trespass on land during absence of owner—Owner bringing friends and resisting with force of arms the trespassers who were also armed—If guilty of forming an unlawful assembly and rioting ... 352

———Ss. 149 and 326—Rioting with deadly weapons causing grievous hurt—Spontaneous fight—Self-defence if can be pleaded ... 383

———S. 266—Using false measures—Gist of offence—Facts to be proved by prosecution ... 486

———Ss. 302 and 328—Offence under—Poisonous drug administered in food—Object of wife to obtain domination and not to kill husband—Nature of offence ... 51

———Ss. 328 and 302—Poisonous drug administered with food by wife—Object to obtain domination over husband and not to kill—Nature of offence ... 51

———S. 454—Person of over 21 years of age convicted under—Not to be released under S. 562, Criminal Procedure Code ... 481

PRACTICE—Application for execution against purchaser of property subject to attachment—Judgment-debtor adjudged insolvent—Official Assignee if to be impleaded in execution proceeding ... 139

———Attachment before judgment—Dismissal of suit—Subsequent restoration on review and decree—Effect on attachment ... 394

———Jurisdiction—Suit valuation—Suit for partition of family properties and possession of share ignoring a partition effected during plaintiff's minority as null and void—Value for cancellation of prior partition deed—If to be included ... 249

———Winding up of company—Sale by Official Receiver—Advertisement in newspaper calling for tenders—Highest bid not accepted—Fresh tenders called—Propriety ... 123

———*Quia timet* action—Co-heirs of Mahomedan testator—Apportionment of properties and mortgage debt—Agreement to discharge portion of debt and keep indemnified—Default —Suit to enforce agreement to pay—Enforceability—Form of decree to be passed ... 131

———*Res judicata*—Judgment-debtor remaining *ex parte* in earlier execution petition—Objection as to jurisdiction deemed to be waived... 198

———Suits decreed by single judgment—Appeal against one decree only—Decree in other suits when do not operate as *res judicata* (F.B.). 1

PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909), S. 13 (4)—Creditors' petition for adjudication—Deposit of moneys in Court by debtors—Refusal to receive payment by creditors—Prosecution of application is abuse of process ... 262

———S. 49 (5)—Insolvency of Hindu son—No priority in regard to joint family property for creditor of the insolvent's father against the

PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909)—*Contd.*

creditors of the son—Priority exists in respect of father's separate property (P.C.) ... 239

———S. 52 (2) (*a*)—Commutation of pension and receipt of a lump sum by insolvent—Official Assignee entitled to claim the amount in the hands of the insolvent for the benefit of the creditors. 265

———S. 68—Powers of Official Assignee—Settlement of claim—Compromise entered into—Leave of Court not applied for or obtained—Effect—Application by succeeding Official Assignee for directions—Procedure ... 214

PROMISSORY NOTE—Payees partners of a firm—No mention of firm's name in the note—Maintainability of suit by payees individually ... 61

PROVINCIAL INSOLVENCY ACT (V OF 1920)—Annulment of adjudication subject to properties continuing to vest in the Official Receiver for one year—Execution proceedings within that period without impleading the Official Receiver—Sale in execution after the expiry of year—Sale if to be set aside ... 83

———Gift by *N* to his wife—Adjudication of *N* as insolvent—Gift set aside at the instance of Official Receiver—Annulment of adjudication—Subsequent will disposing of property—Annulment of adjudication revives gift and the will is of no effect ... 166

———Sale by Official Receiver—Advertisement calling for tenders but non-acceptance of highest bid—Calling for fresh tenders—Propriety ... 123

———S. 2 (*d*)—" Property "—Hindu father's power to sell son's share and karta's power to sell other member's property—If property ... 24

———S. 4—Application linked with one under S. 4—No second appeal lies ... 39

———S. 4—Application to set aside transfer—Time limit ... 125

———Ss. 4, 53, 54-A—Deed of settlement by insolvent for marriage provision of his daughter—Settlement more than 2 years prior to presentation of insolvency application—Official Receiver declining to take action—Effect of unconditional discharge ... 356

———Ss. 19 (2) and 62—Dividend declaration—Date of—Sanction of Court whether essential before notice to creditors regarding the declaration of dividend—Application for scaling of debt whether maintainable ... 411

———Ss. 28, 53 and 54—Alienations by a person for himself and as guardian of other members of joint family—Rights of a father—Vesting of power to dispose of son's share in Official Receiver—Karta's right to dispose of member's shares, does not vest in Receiver—Adult member's share—Insolvency Court's duties ... 24

———Ss. 37 and 68—Continuing of property in Official Receiver after annulment of adjudication—Further directions of Court if necessary to confer power to sell —*Locus standi* of insolvent to apply for setting aside sale ... 127

———S. 53—Application asking for relief under S. 53 linked with one under S. 4—No second appeal lies ... 39

———S. 75—Application for relief under S. 53 linked with one under S. 4—No second appeal lies ... 39

PROVINCIAL SMALL CAUSE COURTS ACT (IX OF 1887), S. 32 (2)—Suit filed as original suit in Munsiff's Court—Court subsequently acquiring small cause powers—If makes decree in the suit a small cause one and therefore not appealable ... 421

———S. 34 and Civil Procedure Code (V of 1908), S. 73 and O. 21, r. 82—Scope ... 57

RECEIVER—Mortgage action--Property purchased by him at a sale held by Official Receiver—Public policy violated—Purchase invalid. 193

REGISTRATION ACT (XVI OF 1908 as amended), Ss. 17 and 49—Contract to sell immovable properties of over Rs. 100 in value evidenced by a letter—Admissibility of letter in evidence in suit for specific performance ... 469

———S. 32—Will—Presentation for registration by natural father of minor widow—Validity (F.B.) ... 272

SPECIFIC RELIEF ACT (I OF 1877), Ss. 27 (*c*) and 42—Agreement for sale by father—Prior title which might be displaced—Suit for specific performance against sons and alienee—Maintainability—Nature of right of plaintiff ... 404

TORT— Defamation— Privilege— Statement in pleading—Rule of absolute privilege—Applicability—Limits of the rule—Statement having reference to inquiry—Whether privileged ... 186

———False imprisonment—Suit for damages—Police officer effecting arrest—When protected—Absence of *bona fide* reason—Liability in damages—Previous prosecution for same act—Acquittal—Whether bars civil suit ... 447

———Negligence—Claim for damages—Burden of proof ... 188

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 23-A—Has no retrospective effect (F.B.) ... 335

———S. 41—Transfer by ostensible owner—When binding on real owner ... 219

———S. 53—Not exhaustive ... 125

———S. 53—Settlement by insolvent for marriage provision of his daughter—Unconditional discharge—Effect on right of creditor to challenge settlement ... 356

———S. 55 (1) (*b*)—Contract of sale of house—Duty of vendor to produce title deeds for inspection—Limits—Vendor if entitled to search for and obtain public copies of other documents at vendor's expense ... 461

———S. 55 (2) (4)—Vendee of mortgage property undertaking to pay off mortgage—Madras Agriculturists' Relief Act coming into force meanwhile—Benefit of reduction in the debt—Person entitled to—Claim for interest on the amount—When valid ... 279

———S. 69—Private sale—Purchase of property by mortgagee—Permissibility—Covenant in deed enabling purchase—Effect—Provision for enhanced interest on arrears of interest—Penalty ... 92

———S. 72—Mortgage with possession and lease back—Rents not collected—Mortgagee if liable to account on the basis of wilful default ... 472

———S. 82—" In the absence of a contract to the contrary "—Interpretation (F.B.) ... 291

TRANSFER OF PROPERTY ACT (IV OF 1882)—*Contd.*

———S. 106—Lease—Agricultural lands—Presumption—Suit for ejectment—Lessor found entitled to both warams—No need for lessor to prove terminable character of tenancy—Well dug by tenant—Not such an improvement as to entitle him to claim compensation ... 43

TRUST—Manager of Devasthanam—Charge of misconduct—Trustee acting upon report and accounts furnished by subordinate staff—No proof of wilful default—Plea of negligence—Proof of loss to estate—Failure to institute suits—Liability for damages ... 144

———Office of manager of temple—Line of devolution—Founder's intention—Descendants in male and famale line to take—Validity—Rule in Tagore case—Applicability ... 434

TRUSTS ACT (II OF 1882), Ss. 23, 94 and 95—Mahomedan co-heirs—Management of minor's estate by elder brother—Death of *de facto* guardian—Suit against legal representatives for account—Liability to pay interest on sums held by guardian ... 78

———Ss. 94 and 95—*De facto* guardian—Liability to pay interest ... 78

WATER—Right to take. *See* Irrigation rights ... 47

WORKMEN'S COMPENSATION ACT (VIII OF 1923)—Accident in the course of employment—Test ... 260

———S. 3—Workman bunkering coal in wharf—Death due to rice bags falling from crane—Path used not prohibited in fact—Effect of notice-board warning people—Accident occurring fifteen minutes after day's work—Accident whether in the course of employment ... 178

UNIVERSITY LIBRARY. LAW COLLEGE